Supreme Court, U.S.
FILED
06-65 JUL 19 2006
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

NATHANIEL RICHMOND
and
STEPHANIE RICHMOND,
Petitioners,

v.

NICHOLAS G. HIGGINS, d/b/a
NICHOLAS G. HIGGINS & ASSOCIATES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a consumer covered by Medicaid, who could sue a hospital using a declaratory judgment action, can maintain an FDCPA action against the hospital's debt collector, who is engaged in a felony — collecting more for a hospital bill than Medicaid would pay — when the facts are otherwise indistinguishable from *Heintz v. Jenkins*, 514 U.S. 291 (1995).

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OPINIONS BELOW

The Eighth Circuit's order denying without comment the motion for rehearing and rehearing en banc was not officially reported. The court entered the order in case number 05-1206 on April 24, 2006 and it is reproduced at App. A at 1a.

The Eighth Circuit's opinion affirming on other grounds the District Court's entry of summary judgment in favor of the debt collector is officially reported at 435 F.3d 825 and is reproduced at App. B at 2a.

The district court's decision and judgment, granting the debt collector's second motion for summary judgment and dismissing the suit with prejudice, both dated December 15, 2004, were not officially reported. The United States District Court for the Eastern District of Missouri entered them in case No. 1:03CV0112, which are reproduced at App. C, 10a, and 24a, respectively.

JURISDICTION

The Eighth Circuit entered judgment on February 2, 2006 and denied rehearing or rehearing en banc on April 24, 2006. This court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254 and Rule 13.1.

STATUTORY PROVISIONS INVOLVED

This case involves the Fair Debt Collection Practices Act (FDCPA or "the Act"), 15 U.S.C. §§ 1692, and 1692a-1692o, set out in App. D at 25a.

STATEMENT OF THE CASE

The consumers filed suit in the United States District Court for the Eastern District of Missouri alleging that the defendant violated the FDCPA, 15 U.S.C. § 1692a *et seq.*, and the court had general federal question jurisdiction pursuant to 28 U.S.C. § 1331. 435 F.3d 825 at 826. There is no dispute: the petitioners are consumers; the obligation is a debt; and, the Respondent is a debt collector. *Id.* n.2. The district court granted the debt collector's second motion for summary judgment on the theory that, since its communications were directed to the consumer's attorney, the consumers could state no cause of action. *Id.* at 826. The Eighth Circuit declined to address that issue and declared that the FDCPA did not apply to the fact pattern. *Id.* at 828-29.

A. Summary of the Facts

Nathan Richmond had Medicaid coverage. Plaintiff's Answers to interrogatories, Exhibit A, attached to Court Document 25, Defendant's Statement of Material Facts.[1] He was injured in an automobile accident on Saturday, June 2, 2001. *Ibid.* A hospital admitted him and the first entry on the face-sheet for Nathan's bill was his Medicaid number. Deposition of Melinda Bowman, Exhibit 20, attached to Court Document 30, the Memorandum in Support of the Plaintiffs' Motion for Summary Judgment. On Monday, June 4, the billing sheet indicates Medicaid approved three-days inpatient care. *Id.* at 28. The Medicaid per diem rate, which Medicaid pays for all approved inpatient care, was about $538.00. *Id.*

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[1] The United States District Court for the Eastern District of Missouri maintains electronic files. All of the proceedings below are available *via* PACER.

at 25. For other services, Medicaid pays twenty-cents on the dollar. *Id.* at 33. The hospital did not bill Medicaid and, after being contacted by Nathan's attorney, it tried to assert a lien on his tort settlement. 435 F.3d 825 at 826-27. On October 2, 2002, the hospital forwarded Nathan's bill to its debt collector advising the debt collector that Nathan and his wife, who has liability pursuant to the doctrine of necessities, owed the hospital $6,716.40. *Id.* at 827.

The debt collector initially contacted the consumers' counsel on October 9, 2002 and sent a follow-up letter in February 2003. *Ibid.* Both letters alleged the consumers owed $6,716.40. *Ibid.* On April 1, 2003, consumers' counsel faxed the debt collector advising it the FDCPA had been violated by misstating the amount of the debt. *Ibid.* When the debt collector sought clarification, the consumers' counsel answered by fax on April 9 advising that pursuant to 42 U.S.C. § 1396a(a)(25)(C) & (D) medical providers could not charge more than Medicaid would pay. *Ibid.* Both April letters sought to settle the debt, initially for 40% of the bill and subsequently for whatever Medicaid would pay. App. C at 14a. As the hospital had never perfected its lien, when the personal injury case settled in August 2003 the funds were distributed to the consumers. 435 F.3d 825 at 827. The debt collector's next communication, dated September 30, 2003, again represented the obligation as $6,716.40. *Ibid.* It was answered with the complaint filed with the district clerk on October 6, 2003 alleging the debt collector had misrepresented the amount of the debt in violation in 15 U.S.C. § 1692e(2)(A). *Ibid.*

B. The Decisions Below

The district court granted the debt collector's second motion for summary judgment. *Id.* at 826. The court

reasoned that, as the debt collector's letters were directed to the consumer's attorney, the consumers could state no cause of action. App. C at 22a. The Eighth Circuit, noting that 15 U.S.C. § 1692e applies to "...*any* false, deceptive or misleading misrepresentation...", without limitation to the actors involved, 435 F.3d 825, at 828 (emphasis in original), declined to address the issue and affirmed summary judgment on other grounds.

The Eighth Circuit began by observing the purpose of the Act was to rein in abusive collection practices and, toward that end, included rules, § 1692g, governing the initial contact between debt collectors and consumers. *Id.* at 828-29. The court opinion then noted the consumers "filed this FDCPA action to dispute a debt" even though they never disputed the debt with the creditor between November 2001 and April 2003 and did not notify the debt collector of the dispute during the first six months of its involvement, October 2002 to April 2003. *Id.* at 829. The court concluded:

> There is nothing in the record to show that the basis for the dispute did not exist prior to April 1, 2003. Having carefully reviewed the record and the text and legislative history of the FDCPA, we can ascertain no basis for a claim in these circumstances. To hold otherwise would be to sanction consumer conduct that the FDCPA clearly did not contemplate.

Ibid. The court did note that the consumers continued to have the right to dispute the debt. *Id.* at n.6.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit decided an important federal question in a way that conflicts with *Heintz v. Jenkins*, 514 U.S. 291 (1995). Not only did the Eighth Circuit extend the safe-harbor provision in 15 U.S.C. § 1692g(a)(3) to facts indistinguishable from *Heintz*, it did so in the context of a debt collector who was aiding and abetting the creditor's commission of the felony described in 42 U.S.C. § 1320a-7b(d)(1). The court had to violate a basic tenant of summary judgment and read the evidence in the light most favorable to the moving party to avoid considering that this FDCPA action is indistinguishable from prior § 1983 actions brought against states. Having recently resolved the scope of a Medicaid lien in a declaratory judgment action involving tens of thousands of dollars, the remaining important federal question is whether those of more modest means can rely on FDCPA actions.

I. CONFLICT WITH *HEINTZ* AND THE FELONY

In *Heintz*, this court established that the FDCPA extends to the lawyers representing creditors. *Heintz*, 514 U.S. 291. Jenkins, the consumer, bought a car and defaulted on the loan. *Id.* at 293. The bank hired a lawyer, Heintz, to collect the balance due. *Ibid.* Heintz filed suit on June 13, 1991. *Jenkins v. Heintz*, slip op. 93 C 1332, 1996 WL 5355167 (N.D. Ill. Sept. 18, 1996). About one year later, on July 9, 1992, the creditor's lawyer sent a letter to the consumer's lawyer, which included a line item of damages of $4,173.00 for insurance. *Ibid.* On March 3, 1993, Jenkins filed suit against Heintz alleging violations of the FDCPA, including attempts to collect money not owed under the contract and misrepresenting the amount of the debt owed. 514 U.S. 291, 293. The original district court opinion theorized the Act

only extended to dunning letters and, as the letter in question was not threatening, was level-headed and sent to the consumer's lawyer, suit would not lie. *Jenkins v. Heintz*, slip op. 93 C 1332, 1993 WL 284115 (N.D. Ill. July 27, 1993). This court, agreeing with the Seventh Circuit, held that the FDCPA extended beyond traditional debt collection activities, such as dunning letters, to include lawyers engaged in litigation activity. 514 U.S. 298-99.

The Eighth Circuit has now extended the safe-harbor protection in 15 U.S.C. § 1692g(a)(3) to protect a debt collector from being sued over a dunning letter that misrepresents the amount of the debt owed. As with *Heintz*, this case involves a dispute about a contract, a health insurance policy, Medicaid, verses the consumer loan documents in *Heintz*. It involves multiple dunning letters from the debt collector, not just the one settlement letter sent in *Heintz*. Moreover, unlike consumer's counsel in *Heintz*, Richmonds' counsel warned the debt collector it was being misled by the creditor. It was only after the debt collector ignored the April warnings and sent the September dunning letter seeking the full bill that the consumers filed suit in October. Whereas Jenkins had already been sued and was apparently vexing the creditor's counsel with the FDCPA action, the consumers in this case have never been sued and the proceeds of the personal injury settlement were distributed prior to filing the FDCPA action. Payment of the debt is wholly unrelated to this FDCPA action. If the FDCPA extends to a lawyer passing along a settlement demand, *Heintz*, *a fortiori* it applies to a lawyer, acting as debt collector, sending a dunning letter after it has been warned the creditor wants payment for more than the law, which sets out the contract terms, allows.

If the Eighth Circuit's opinion stands, then the suit against Heintz should have been dismissed. When Heintz filed suit that triggered the debt validation and dispute provisions in § 1692g. *Goldman v. Cohen*, 445 F.3d 152 (2d Cir. 2006). Jenkins never sought validation of the debt. It was more than a year after § 1692g had been triggered that Heintz sent the offensive letter. Under the Eighth Circuit's rationale, dismissal of the *Jenkins v. Heintz* suit was required.

The Eighth Circuit's reading of 15 U.S.C. § 1692g(a)(3) is untenable. The safe-harbor only allows the debt collector to assume the debt is valid. It is not an irrebuttable presumption and, after April 2003, the debt collector was on notice the assumption was no longer valid.

The fact that the creditor in *Heintz* may have filed suit before the consumer could dispute the debt does not serve to distinguish the cases. In the first instance, the fact that suit had yet to be filed in the case at bar removes the only interesting aspect of *Heintz*, i.e. did the FDCPA apply to a debt collector's litigation activities. The case at bar involves traditional debt collection practices and lies in the heartland of conduct covered by the FDCPA. In the second instance, suit could never be filed by the creditor as:

> Whoever knowingly and willfully--
>
> > (1) charges, for any service provided to a patient under a State plan approved under subchapter XIX of this chapter, money or other consideration at a rate in excess of the rates established by the State...
>
> ***

> shall be guilty of a felony and upon conviction thereof shall be fined not more than $25,000 or imprisoned for not more than five years, or both.

42 U.S.C. § 1320a-b(d). A suit commenced in a hospital's name seeking payment in excess of Medicaid's rates from a patient covered by Medicaid is a felony. The Medicaid contract is between the state and the hospital. *Spectrum Health Continuing Care Group v. Anna Marie Bolling Irrevocable Trust Dated June 27, 2002*, 410 F.3d 304, 313 (6th Cir. 2005). The Medicaid recipient is a third-party beneficiary. *Barney v. Holzer Clinic, Ltd.*, 110 F.3d 1207, 1209-11 (6th Cir. 1997). The healthcare provider may not ordinarily seek payment directly from the Medicaid recipient. *Spectrum,* 410 F.3d at 313-21; *see* Mo. Code Regs. Ann. tit. 13, § 70 - 4.030(1) (2006)(presumption Medicaid will be billed that can only be overcome by a written agreement to bill the patient). The fact the consumers offered to pay what Medicaid would, as several legal issues were unsettled in 2003, *see Arkansas Dept. of Health and Human Services v. Ahlborn,* ___ U.S. ___, 126 S.Ct. 1752 (2006), does not change the fact the debt collector erred in ever seeking payment in excess of what Medicaid would have paid. *See* 42 U.S.C. § 1396a(a)(25)(C).

II. TENANTS OF SUMMARY JUDGMENT AND § 1983

The opinion violates the basic tenants of summary judgment. To find an evidentiary basis to sanction the debt collector's aiding and abetting the creditor's commission of a felony, the Eighth Circuit reasoned thus:

> Richmond was aware of the debt amount almost a year before the debt was sent to Higgins for collection.

> There is nothing in the record to show that the basis for this dispute did not exist prior to April 1, 2003.

435 F.3d 825, 829. There is nothing in the record because the moving party, the debt collector, never alleged this was an undisputed, much less a material, fact. In *Heintz*, it was nine months between the July letter and the March suit and the consumers had been sued in an action for breach of contract, giving them a motivation to read the contract. *Jenkins v. Henitz*, slip op. 93 C 1332, 1996 WL 535167 (N.D. Ill. Sept. 18, 1996). In the case at bar, involving a personal injury, the consumers had no motivation to read the contract of one claiming a lien until it seemed likely the tort claim would bear fruit. In *Spectrum,* the PI lawyer never read the contract, stipulated to the lien in open court and the tort-victim's trust filed a declaratory judgment action. *Spectrum, supra* 410 F.3d 304, 310-313 (holding the stipulation was not sufficient to amount to issue preclusion). In this case, the consumers' counsel had no motivation to read the contract documents, as compared to *Heintz,* and, while *Heintz* was dealing with standard commercial paper, the Richmonds' lawyer was dealing with a health insurance policy written by Congress. The inference to be drawn in favor of the non-moving party, the consumers, is that it took their counsel awhile to find 42 U.S.C. § 1396a(a)(25)(C). As the opposing party's first reaction to notice of the dispute was to claim there was no such law, disputing the debt earlier, with either the debt collector or the hospital, would have been futile.

Just finding the statute accomplished nothing as, like as not, a statute is often just puffery describing official duties rather than enforceable rights. At the time counsels were exchanging letters in 2003, it was unclear whether a tort settlement was a consumer's property, which issue Arkansas unsuccessfully advanced in *Arkansas Dept. of Health and*

Human Services v. Ahlborn, ___ U.S. ___, 126 S.Ct. 1752 (2006); *see also Spectrum*, 410 F.3d 304, 321-25 (Nelson J. dissenting suggesting a private hospital's *Ahlborn* type lien was a collection from the tortfeasor). While the parties in *Ahlborn* apparently agreed to settle the dispute by way of a declaratory action, in 2003 the only authority was an unpublished Ninth Circuit opinion declaring no suit would lie against the hospital and a *certiorari* denied case holding the Medicaid patient had no standing to sue a state. *Harding v. Summit Medical Center*, slip op. 01-15967, 2002 WL 1453743 (9th Cir. July 3, 2002); *Tracy v. Commonwealth*, 396 A.2d 913 (Pa. Commw. Ct. 1979), *cert. denied* 448 U.S. 907 (1980). The consumer's statement in April 2003 that the FDCPA was the only vehicle for enforcing 42 U.S.C. § 1396a(a)(25)(C) was accurate at the time. The fact that those issues have been resolved while this case was pending simply bears out the importance of the federal question in the case at bar.

The consumers counsel had stumbled on *Mallo v. Public Health Trust of Dade Co., Fla.*, 88 F.Supp.2d 1376 (S.D. Fla. 2000). In *Mallo*, the healthcare consumers brought suit to keep the state from balance billing. *Ibid.* While it is not the most obvious substitution set, in the context of a Medicaid billing dispute, there did not seem to be any obstacle to substituting "debt collector" and "FDCPA" for "state action" and "§ 1983". The consumers were even more confident of this assessment when they learned that, unlike *Ahlborn* and *Mallo*, which involved open questions of law, they were suing a professional debt collector who was lending his services to a creditor engaged in a billing practice Congress described as a felony.

Congress enacted the FDCPA because existing remedies, such as declaratory judgment actions, were inadequate to

protect consumers. 15 U.S.C. § 1692. Healthcare consumers found succor in § 1983 to foreclose a state's balance billing efforts. *Mallo, supra.* The Sixth Circuit has ruled in a declaratory judgment action that, once Medicaid is billed, seeking payment from the tort victim is foreclosed. *Spectrum* 410 F.3d 304 (6th Cir. 2005). In a unanimous opinion arising from a declaratory judgment action, this court ruled Medicaid's lien only extends to that portion of a tort settlement attributable to medical costs. *Arkansas Dept. of Health and Human Services v. Ahlborn*, ___ U.S. ___, 126 S.Ct. 1752 (2006). Once the debt collector was warned it had been misled by the creditor but persisted in the abusive practice of demanding more than the contract obligated the consumers to pay, the consumers could forego the declaratory judgment action and proceed under the FDCPA.

The Eighth Circuit's opinion stands in direct contradiction with *Heintz*. It does that in a case where the defendant is admittedly a debt collector. 435 F.3d 825, 826 n.2. The opinion stands in contravention of the reason *d'etre* for the FDCPA, existing remedies were inadequate. *cf.* 435 F.3d at n.6. The consumers could have told the debt collector to cease all further communications. 15 U.S.C. § 1692c(c). Having adopted the less extreme position of offering to pay what they would have owed if Medicaid had been billed, the consumers had a right to expect that the debt collector would honor their request, file suit or return the debt to the creditor. Electing to persist, it was sued. The second and sixth footnotes of the opinion admit all four elements of the consumers' cause of action. The debt collector is liable if it turns out the debt is misstated. 15 U.S.C. § 1692e(2)(A). Aside from the fact the debt is insufficient to justify the consumers bringing a declaratory judgment action, the debt has proven insufficient for the creditor to file suit or it might be the felony statute, in any case this is exactly the

circumstances where the FDCPA serves its core function of protecting consumers from persistent debt collection efforts.

III. THE CONSUMERS' SUIT SHOULD GO FORWARD

There is no need for courts to create from whole cloth new defenses to FDCPA actions. 435 F.3d 825, 829 n.5 (noting the Act does not expressly address what happens when a debt is disputed after thirty days). The Act is elegant. Complying with the Act is simple. The Act includes a *bono fide* error defense for honest mistakes. 15 U.S.C. § 1692k(c). The safe harbor in § 1692g(a)(3) is only an assumption. It is not the irrebuttable presumption the Eighth Circuit has created.

After the April warning, the debt collector had several options. It could return the debt to the creditor, which is what Discover Card's debt collectors do. *Jang v. A. M. Miller and Associates*, 122 F.3d 480, 482 (7th Cir. 1997). It could bring suit. *Heintz v. Jenkins*, 514 U.S. 291, 297 (1995)(theorizing that even a cease and desist demand by a consumer would not preclude bringing suit). It could continue to communicate with the consumer but stop representing the amount of the debt, which is what the debt collector did on April 3, 2003, in its effort to determine the nature of the dispute. Finally, the debt collector could send another dunning letter claiming the consumer owed what the creditor told the debt collector to collect, which is what the debt collector did on September 30, 2003. Having chosen the latter course after being informed the consumer disputed the debt because the law forbids collection, it should have come as no surprise the debt collector was invited into court to defend the verity of the creditor's claims. Even now, the debt

collector can escape liability if the creditor has correctly stated the debt. App. C at 22a.

The Act gives consumers several options when they are confronted by a debt collector seeking payment on a debt they dispute. Consumers can offer to pay what they admittedly owe but insist the debt collector file suit if more will be necessary to resolve the matter. 15 U.S.C. § 1692g(b). The Act allows that outcome even during the thirty-day validation period, when a debt collector is otherwise obligated to cease and desist all collection efforts. *Ibid.* If the consumers become feed-up, they can insist a debt collector cease and desist all collection efforts. 15 U.S.C. § 1692c(c).

The grand sum total effect of the FDCPA on the case at bar was to vest the consumers with the right to tell the debt collector to leave them alone or file suit. Why the simple proposition that consumers can force a debt collector's hand has been met with such resistance by the courts below is inexplicable. To the contrary of the Eighth Circuit's conclusion, § 1692g does not vest debt collector's with the right to ignore consumers' protests nor does that section divest consumers of their right to call a debt collector's bluff. All it requires is for consumers to give debt collectors fair warning before filing suit. *See Jenkins v. Heintz*, 124 F.3d 824 (7th Cir. 1997)(finding that Heintz committed a *bono fide* error). To entertain the notion consumers must dispute the debt during the first 30 days of collection efforts or lose many of the FDCPA's protections, requires a belief such consumers' only remedy is to advise the debt collector to cease all communications. 15 U.S.C. § 1629c(c).

As measured against *Heintz*, the debt collector's conduct in the case at bar is utterly indefensible, which is why the Eighth Circuit had to create a new defense. Heintz was sued

under a claim that would turn on what type of insurance the minutia of consumer lending contract allowed the creditor to purchase. While the overall health insurance contract in this case may be more complex, once the consumer cited the relevant contract clauses to the debt collector, 42 U.S.C. §§ 1396a(a)(25)(C) & (D), the contract is unmistakably clear. The debt collector was warned the contract barred what the creditor told the debt collector to seek. The contract terms, while dense, could not reasonably be misunderstood. In lieu of setting forth the statute and then in separate paragraphs treating each phrase and the relevant facts from the case, the consumers will append the relevant facts in brackets to each clause of the statute, to-wit:

> **(C)** that in the case of an individual who is entitled to medical assistance under the State plan [Nathan Richmond was entitled to medical assistance at the time of admission]
>
> with respect to a service for which a third party is liable for payment, [the bill in question relates to care occasioned by the automobile accident]
>
> the person furnishing the service [the hospital, the debt collector's client]
>
> may not seek to collect from the individual (or any financially-responsible relative or representative of that individual) [pursuant to *Ahlborn* this now includes the tort settlement]
>
> payment of an amount for that service [which includes asserting a lien, *Ahlborn*]

> (i) if the total of the amount of the liabilities of third parties for that service is at least equal to the amount payable for that service under the plan (disregarding section 1396o of this title), [the tort settlement exceeded the $1,614.00 Medicaid would have paid]
>
> or (ii) in an amount which exceeds the lesser of (I) the amount which may be collected under section 1396o of this title, [Nathan's $10.00 co-pay]
>
> or (II) the amount by which the amount payable for that service under the plan (disregarding section 1396o of this title), exceeds the total of the amount of the liabilities of third parties for that service; [the payment exceeded Medicaid's $1,614.00, so the lesser amount is zero.]

42 U.S.C.A. § 1396a(a)(25)(C) (West 2006); *Arkansas Dept. of Health and Human Services v. Ahlborn*, ___ U.S. ___, 126 S.Ct. 1752 (2006).

Once the creditor hired a debt collector, the FDCPA vested the consumers with the right to call the debt collector's bluff. When the debt collector ignored the call, the consumers gained standing to bring their FDCPA action. The debt collector has no viable defense that would preclude a court from reaching the merits of the consumer's claim *i.e.* that Congress intended the words "... the person furnishing the service may not seek to collect from the individual ... payment ... in an amount which exceeds the lesser of ...[what Medicaid would pay]" to be given their plain meaning and conclude the debt collector violated 15 U.S.C. § 1692e(2)(A). *See Arkansas Dept. of Health*, *supra* (interpreting 42 U.S.C. §§ 1396a(a)(25)(A) & (B) in a similar manner.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 05-1206

[Filed April 24, 2006]

Nathaniel Richmond, et al., Appellants,	)
v.	)
Nicholas G. Higgins, etc., Appellee.	)

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Order Entered at the Direction of the Court:

/s/ _____
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 05-1206

[Filed February 2, 2006]

Nathaniel Richmond,)
Stephanie Richmond,)
Appellants,)
)
v.)
)
Nicholas G. Higgins, doing business as)
Nicholas G. Higgins & Associates,)
Appellee.)

Appeal From the
United States District Court
for the Eastern District of Missouri
No. 1:03cv0112TCM

Before MURPHY, HEANEY, and MELLOY, Circuit Judges.

OPINION

HEANEY, Circuit Judge.

Nathaniel Richmond and his wife, Stephanie Richmond, brought this action against Nicholas Higgins, d/b/a/ Nicholas G. Higgins & Associates (Higgins), a debt collection agency, wholly owned by Nicholas Higgins. Richmond alleged that Higgins violated the Fair Debt Collection Practices Act (FDCPA) by misstating, in communications with Richmond's attorney, the amount Richmond owed for treatment he received at Barnes Jewish Hospital (BJH). The district court[1] granted Higgins summary judgment based on its conclusion that the FDCPA's prohibition of false statements in connection with the collection of a debt does not apply to communications with the debtor's attorney.[2] We affirm, but not for the reason stated by the district court.

BACKGROUND

Nathaniel Richmond was injured in an automobile accident and treated at BJH in June 2001. He retained Attorney John Albright to represent him in his personal injury action against the other driver. In October 2001, Albright sent BJH a letter requesting a copy of Richmond's unpaid bill and

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[1] The Honorable Thomas C. Mummert III, United States Magistrate Judge for the Eastern District of Missouri. Both parties consented to the jurisdiction of the magistrate, with direct appeal to this court. 28 U.S.C. § 636(c)(3).

[2] It is undisputed that Higgins is a "debt collector," Richmond is a "consumer," and the "debt" that Higgins attempted to collect from Richmond fits the statutory definition of "debt" under the FDCPA. *See* 15 U.S.C. § 1692a(3), (5), (6) (defining terms).

medical records. On November 5, 2001, BJH provided the requested materials, which showed an outstanding balance of $6,716.40. In January, February, and April of 2002, BJH contacted Albright regarding the outstanding balance on Richmond's account. Each time Albright informed BJH that Richmond was attempting to settle the personal injury action and asked BJH to call him back in a few weeks, but did not challenge the validity or the amount of the debt.

In October of 2002, BJH forwarded Richmond's still unpaid account to Higgins for collection. On October 9, 2002, Higgins sent a notice of hospital lien letter to Albright referencing Richmond, BJH, and the outstanding debt amount of $6,716.40. (Appellants' App. at 53.) As required by the FDCPA, *see* 15 U.S.C. § 1692g(a)(4), the letter stated that failure to notify Higgins within thirty days of receipt of the letter of any dispute regarding the validity of the debt would result in an assumption that the debt was valid (Appellants' App. at 53). Although it is undisputed that he received it, Albright never responded to the October 9, 2002 letter. On February 13, 2003, Higgins sent a second letter to Albright requesting a status report on Richmond's personal injury claim. (Appellants' App. at 54.) Albright responded to the February 13 letter on April 1, 2003, alleging for the first time that Higgins misstated the debt amount, in violation of the FDCPA. Albright claimed that federal Medicaid law prohibited Higgins from collecting an amount exceeding the amount that Medicaid would pay. (*Id.* at 55.) Prior to Albright's April 1, 2003 letter, Higgins had no knowledge that the debt amount was disputed or that a medical care provider, who did not bill Medicaid, might be restricted from collecting more than the Medicaid amount from a Medicaid-eligible patient. (*Id.* at 51.) On April 9, 2003, Albright sent Higgins another letter stating that he could not "find any way

to enforce 42 USCA 1396a(a)(25)(C)&(D)[3] against medical providers other than through the [FDCPA]." (*Id.* at 17.)

Richmond's personal injury lawsuit settled on August 9, 2003. On September 30, 2003, Higgins wrote to Albright requesting that they discuss payment arrangements, otherwise BJH would reduce its claim to judgment. On October 6, 2003, Richmond sued Higgins in federal district court alleging that Higgins violated the FDCPA by misstating the debt amount in its communications with Albright. Richmond alleged that he was eligible for Medicaid, and thus BJH and Higgins were prohibited from attempting to collect an amount exceeding the amount that Medicaid would pay. Higgins moved for summary judgment alleging that: (1) it could rely on BJH's representations regarding the debt amount; (2) the focus of the FDCPA is on the conduct of the debt collector, not the amount of the debt; and (3) letters to the debtor's attorney are not actionable under the FDCPA. The district court granted summary judgment to Higgins based on its conclusion that communications with the debtor's attorney are not actionable under the FDCPA, and did not address Higgins's remaining bases for summary judgment. Richmond subsequently filed this appeal.

ANALYSIS

Richmond argues that the district court's finding, that the communications with his attorney are not actionable under the

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[3] Richmond's allegation that the Medicaid amount is the maximum amount a healthcare provider can collect from a Medicaid-eligible patient, where the healthcare provider elects to collect from the patient rather than Medicaid, has not yet been accepted by our court. For purposes of this appeal we need not determine whether Richmond's interpretation is correct.

FDCPA, contradicts the plain language of 15 U.S.C. § 1692e. Higgins asserts that the district court correctly interpreted the FDCPA, and even if it did not, Higgins is nonetheless entitled to summary judgment on alternative grounds. We review the district court's grant of summary judgment de novo, viewing the evidence "in a light most favorable to the nonmoving party," *Peters v. Gen. Serv. Bureau, Inc.*, 277 F.3d 1051, 1054 (8th Cir. 2002), and affirming if "there is no genuine issue as to any material fact and . . . the moving party is entitled to summary judgment as a matter of law," Fed. R. Civ. P. 56(c). We review the district court's interpretation of a statute de novo. *Dowd v. USW, Local No. 286*, 253 F.3d 1093, 1099 (8th Cir. 2001). Although the district court did not address Higgins's alternative grounds for summary judgment, this court may affirm on any basis supported by the record. *Brown v. St. Louis Police Dep't*, 691 F.2d 393, 396 (8th Cir. 1982).

The district court granted summary judgment because the communications in question were directed to the debtor's attorney rather than the debtor. Whether § 1692e regulates communications directed to the consumer's attorney is a matter of first impression for this court.[4] According to

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[4] Although no circuit court has decided this issue, several district courts have held that the FDCPA does not apply to communications with the debtor's attorney, and dicta from the Second Circuit has reached the same conclusion. *See Kropelnicki v. Siegel*, 290 F.3d 118, 127 (2nd Cir. 2002) (stating in dicta that communications with the debtor's attorney are not actionable under the FDCPA); *Diesi v. Shapiro*, 330 F. Supp. 2d 1002, 1004 (C.D. Ill. 2004) (holding that letters written to plaintiffs' attorney were not actionable under the FDCPA, citing Kropelnicki.); *Zaborac v. Phillips & Cohen Assocs., Ltd.*, 330 F. Supp. 2d 962, 967 n.5 (N.D. Ill. 2004) (citing *Kropelnicki*, in finding that § 1692g does

§ 1692e, "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." (Emphasis added). This includes the misrepresentation of the debt amount. § 1692e(2)(A). "If the plain language of the statute is unambiguous, that language is conclusive absent clear legislative intent to the contrary." *Dowd*, 253 F.3d at 1099 (further citation omitted). Several sections of the FDCPA restrict the scope of its application by including the word "consumer" in the text. *See, e.g.*, 15 U.S.C. §§ 1692g, 1692f(7), (8). But at least one section includes specific language to illustrate that it applies to "any person." *See* § 1692d. Thus, at least in other sections, the FDCPA specifies the actors to which the section applies. Section 1692e contains no indication of to whom it applies, but rather states to what it applies ("any" representation or means). Because we affirm on an alternative basis, we find it unnecessary to decide whether the FDCPA would apply to communications with a debtor's attorney at this time.

The purpose of the FDCPA is to "eliminate abusive debt collection practices by debt collectors," § 1692(a), and debt

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not prohibit debt collection communications targeted at the debtor's attorney); *Tromba v. M.R.S. Assocs., Inc.*, 323 F. Supp. 2d 424, 427-28 (E.D.N.Y. 2004) (citing *Kropelnicki* in finding that a fax addressed to the debtor's attorney was not actionable under the FDCPA); *Phillips v. N. Am. Capital Corp.*, 1999 U.S. Dist. LEXIS 7000, 1999 WL 299872 (N.D. Ill. Apr. 30, 1999) (holding that debtor-plaintiff did not have standing to bring FDCPA § 1692g claim based on communications sent to his attorney) (unpublished); *Ignatowski v. GC Servs.*, 3 F. Supp. 2d 187, 190-91 (D. Conn. 1998) (dismissing FDCPA claim based on the failure to include statutorily required disclosures under § 1692e(11), because the attorney in that case could easily discern that defendant was attempting to collect a debt).

collectors are liable for failure to comply with "any provision" of the Act. § 1692k(a). The FDCPA requires debt collectors to notify debtors within five days of the initial communication with the debtor of the debtor's right to dispute the debt. § 1692g(a)(3). The debt collector must also inform the debtor of its right to assume that the debt is valid if the debtor fails to dispute the debt within thirty days of receipt of the notice. Id. If the debtor disputes the debt within the thirty-day period, the debt collector must "cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt . . . ." § 1692g(b)[5]. Failure to dispute the debt within the thirty-day period is not an admission of liability. § 1692g(c).

Richmond filed this FDCPA action to dispute a debt. Richmond's attorney, Albright, was aware that the debt amount was $6,716.40 in early November 2001, communicated directly with BJH in January, February, and April of 2002, and did not dispute the debt during any of those conversations. The debt was not turned over to Higgins until October of 2002. On October 9, 2002, Higgins sent Albright a letter stating that it was attempting to collect an outstanding debt of $6,716.40, and requested notification of any dispute regarding the debt within thirty days. Albright did not dispute the debt amount within thirty days of receipt of the letter. In fact, Higgins did not receive notice that the debt was disputed until almost six months later, on April 1, 2003. Accordingly, Higgins was permitted under the FDCPA to assume that the debt was valid. *See* § 1692g(a)(3). In the year and five months between the date that Albright was first

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[5] The FDCPA does not speak to whether the protections provided under § 1692g(b) attach if the debtor disputes the debt after the expiration of the thirty-day period.

informed of the debt amount, in early November of 2001, until he first disputed the debt amount on April 1, 2003, the debt amount never changed.

Richmond has never alleged that he was billed for services that were not provided or that he was overcharged for the services he received. The conduct that Richmond alleges violated the FDCPA was Higgins's attempt to collect a previously undisputed debt amount. Richmond was aware of the debt amount almost a year before the debt was sent to Higgins for collection. There is nothing in the record to show that the basis for this dispute did not exist prior to April 1, 2003. Having carefully reviewed the record and the text and legislative history of the FDCPA, we can ascertain no basis for a claim in these circumstances. To hold otherwise would be to sanction consumer conduct that the FDCPA clearly did not contemplate. We hold that there was no violation of the FDCPA,[6] and therefore we affirm the district court's grant of summary judgment.

CONCLUSION

For the above-stated reasons, we affirm the district court.

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[6] We do not hold that Richmond cannot dispute the debt amount.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

Case number 1:03cv0112 TCM

[Filed December 15, 2004]

NATHANIEL RICHMOND and)
STEPHANIE RICHMOND,)
Plaintiffs,)
)
v.)
)
NICHOLAS G. HIGGINS,)
d/b/a Nicholas G. Higgins & Associates,)
Defendant.)
)

MEMORANDUM AND ORDER

This matter is before the Court[1] on two motions for summary judgment filed by defendant, Nicholas G. Higgins, doing business as Nicholas G. Higgins & Associates [Docs. 16 and 23], and one motion for summary judgment filed by

[1] The case is before the undersigned United States Magistrate Judge by written consent of the parties. *See* 28 U.S.C. § 636(c).

plaintiffs, Nathaniel Richmond and Stephanie Richmond [Doc. 30]. Plaintiffs allege in their complaint and motion that Defendant violated the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692-16920, when attempting to collect amounts owed on medical bills incurred by Nathaniel Richmond at Barnes-Jewish Hospital ("BJH").

Background

Nathaniel Richmond ("Nathaniel") was treated at BJH in June 2001 for the injuries he sustained in an automobile accident. (Def. Stip. ¶ 1.)[2] Nathaniel was treated for his injuries, i.e., a fractured pelvis, at BJH. (Pls. Stip. ¶¶ 6, 16.) Thereafter, he and his then-wife, Stephanie Richmond,[3] retained an attorney, John Albright, to represent them in their claim against the other driver, Jerry Tanner. (Def. Stip. ¶ 2.) Stephanie's claim was for loss of consortium. (Pl. Stip. ¶ 39.)

In October 2001, Mr. Albright wrote BJH to request copies of Nathaniel's medical records relating to his June hospitalization and enclosed a medical authorization executed by Nathaniel. (Pls. Ex. 11.) Consequently, on November 5, an assistant sent Mr. Albright a copy of Nathaniel's medical records and a copy of his unpaid bill. (Def. Ex. B.) The unpaid bill was in the amount of $6,716.40. (*Id.*) On January

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[2] "Stip." refers to the uncontroverted facts in which Plaintiffs and Defendant concur. "Def. Stip." refers to the uncontroverted facts proposed by Defendant and admitted by Plaintiffs and "Pls. Stip." similarly refers to the uncontroverted facts proposed by Defendant and admitted by Plaintiffs.

[3] Nathaniel and Stephanie Richmond were divorced sometime between the accident and the settlement of their claims against the other driver.

16, February 6, and April 22, 2002, the BJH bills custodian telephoned Mr. Albright's office about Nathaniel's unpaid medical bill. (Kirkman Aft. ¶¶ 8-10.) Each time, Mr. Albright's assistant informed the custodian that Nathaniel was trying to settle his personal injury action and asked the custodian to call back. (*Id.*)

On October 2, BJH forwarded Nathaniel's unpaid medical bill to defendant Nicholas G. Higgins, doing business as Nicholas G. Higgins & Associates ("NGH"). (*Id.* ¶ 12.) NGH is wholly owned by defendant Nicholas G. Higgins (Higgins) and is often employed by BJH to collect past due accounts. (Higgins Aft. ¶¶ 2-6.) Defendant was also given Mr. Albright's name and address. (Kirkman ¶ 12.)

By letter of October 9, Higgins wrote "Moore and Walsh" – the incomplete name of Mr. Albright's law firm[4] – a letter which read, in relevant part:

> WE ARE DEBT COLLECTORS
> You are hereby notified pursuant to state statute that NATHANIEL RICHMOND whose address is . . . did on June 2, 2001 receive and sustain personal injuries as a result of the negligence of an unknown party.
>
> You are further notified that on June 2, 2001 said was treated at BARNE JEWISH HOSPITAL . . did receive treatment, care and maintenance on account of the aforesaid personal injuries.

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[4] The correct name of the law firm is "Moore, Walsh & Albright, L.L.P."

> Therefore, you are hereby put on notice that, BARNES JEWISH HOSPITAL, is asserting it's [sic] hospital lien upon any and all claims, counterclaims, demands, suits or rights in action of the aforesaid, NATHANIEL RICHMOND, which such injured person may have, assert or maintain against that person . . .
>
> Unless you notify us within thirty (30) days after receipt of the letter that the validity of this debt or any portion of it is disputed, we will assume that the debt is valid. If you do notify us of a dispute, we will obtain verification of the debt and mail it to you. . . . This letter is an attempt to collect a debt, and any information will be used for that purpose. . . .

(Higgins Aft. Ex. 1.) (Alterations added.) Higgins avers he had no reply to this letter. (Higgins Aft. ¶ 10.) Consequently, he sent a second letter to "Moore & Walsh" on February 13, 2003. (Higgins Aft. Ex. "D".) This letter requested a status report on Nathaniel's claim. (*Id.*)

Mr. Albright replied by letter of April 1. (*Id.* Ex. E.) This letter read, in relevant part:

> You sent a collection letter to Nathaniel Richmond regarding treatment received at BJC in June of 2001. Mr. Richmond was on Medicaid[5] and probably

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[5] Plaintiffs have produced a copy of a Medicaid card in Nathaniel's name with his date of birth and a Medicaid number. (Pls. Ex. 10.) This card does not include an effective date of coverage. Regardless, the Court finds that whether Nathaniel was covered by Medicaid in June 2001 is irrelevant to the disposition of the pending motions.

> qualified for Medicaid because of the work of BJC's social service worker. BJC knew this because follow up care was billed to Medicaid.
>
> I am writing because your letter violates the FDCPA by misstating the debt. A health care provider cannot bill more than Medicaid would pay for the same services. Your letter seeks the full debt as billed by BJC not the amount Medicaid would pay.
>
> . . . I would like to work out something agreeable on the debt . . . I would like to suggest an agreement that BJC accept its pro-rata share – there are other medical providers – of 30% of the judgment up to $2,687, which would provide a maximum recovery of 40% of the bill or about what Medicaid will pay. It will also require a satisfaction of the debt regardless of the jury verdict. If hospitals want to try and collect "all the bill" from PI cases, they get to bear the risk of no recovery and, they aren't getting anything more than they are entitled to recover by law.

(*Id.* Ex. E.) (Alterations added.)

Higgins replied two days later, explaining that he was unaware of any statutory provision requiring a health care provider to only bill an amount equal to that which would have been paid by Medicaid but was aware that a provider accepting payment by Medicaid was precluded from billing anyone for the balance. (Pls. Ex. 12.) He requested the citation to such provision. (*Id.*)

Mr. Albright cited a statutory provision, 42 U.S.C. §§ 1396a(a)(25)(C) and (D),[6] suggested an agreement whereby BJC would predict what it would have received from Medicaid on the treatment provided Nathaniel, and opined that "[l]etters to lawyers representing the debtor in a PI case that produced the bill, fall within the definition [of "communications" by FDCPA]." (Pls. Ex. 13.) He also reported that the matter had to be "wrapped up" by October 1, 2003. (*Id.*)

The Richmonds' lawsuit was settled on August 9, 2003. (N. Richmond Aft. ¶ 14.)

On September 30, Higgins wrote Mr. Albright, requesting that he contact NGH on receipt of the letter to discuss payment arrangements for BJH's bill and informing him that without such arrangements BJH had authorized NGH to "reduc[e]" their claim to judgment. (Pls. Compl. Ex. 5.)

Plaintiffs allege in their complaint that Higgins' letters of February 13, 2003, and September 30, 2003, violate the FDCPA by misstating a debt, specifically the amount owed by Nathaniel to BJH. Defendant argues in his first motion for summary judgment that (a) he was entitled to reply on BJH's representations as to the amount of Nathaniel's debt and (b) the focus of the FDCPA is on the conduct of the debt collector and not the validity of the debt. He argues in his second motion that Plaintiffs cannot establish a violation of

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[6] Title 42 U.S.C. §§ 1396a(a)(25) and (26) govern the circumstances and method by which a state plan for medical assistance may seek to recover from third parties for any medical assistance rendered an eligible person.

the FDCPA because the two letters to their attorney are not actionable communications. Plaintiffs disagree and also move for summary judgment.

Discussion

Rule 56(c) of the Federal Rules of Civil Procedure mandates the entry of summary judgment if all of the information before the court shows "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). An issue of material fact is genuine if it has a real basis in the record; and, a genuine issue of fact is material if it "might affect the outcome of the suit under the governing law." *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992) (citations omitted). "Where the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate." *Koehn v. Indian Hills Community College*, 371 F.3d 394, 396 (8th Cir. 2004); *Adams v. Continental Cas. Co.*, 364 F.3d 952, 953 (8th Cir. 2004). The unresolved issues in the instant case are primarily legal rather than factual.

"The purpose of the FDCPA is 'to eliminate abusive debt collection practices by debt collectors, [and] to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged.'" *Strand v. Diversified Collection Serv., Inc.*, 380 F.3d 316, 318-19 (8th Cir. 2004) (quoting 15 U.S.C. § 1692(e)) (alteration in original). *See also Peters v. General Servs. Bureau*, 277 F.3d 1051, 1054 (8th Cir. 2002) (same). To effectuate this purpose, "[t]he FDCPA makes it unlawful for debt collectors to use 'any false, deceptive, or misleading representation or means in connection with the collection of any debt.'" *Freyermuth v. Credit Bureau Servs., Inc.*, 248

F.3d 767, 770 (8th Cir. 2001) (quoting 15 U.S.C. § 1692e) (alteration added). "A violation of the FDCPA is reviewed utilizing the unsophisticated-consumer standard which is 'designed to protect consumers of below average sophistication or intelligence without having the standard tied "to the very last rung on the sophistication ladder."'" *Strand*, 380 F.3d at 317 (quoting *Dubby v. Landberg*, 215 F.3d 871, 873 (8th Cir. 2000) (quoting *Taylor v. Perrin, Landry, de Launay & Durand*, 103 F.3d 1232, 1236 (5th Cir. 1997))). *See also Freyermuth*, 248 F.3d at 771 (focusing on the actions of the debt collector and their potential to deceive an unsophisticated consumer when deciding whether an attempt to collect on a potentially time-barred debt violated the FDCPA). "A successful plaintiff may recover actual damages, statutory damages up to $1,000, attorneys fees, and costs." *Peters*, 277 F.3d at 1054-55 (citing 15 U.S.C. § 1692k(a)).

Also to effectuate the purpose of the FDCPA, 15 U.S.C. § 1692c(a)(2) mandates that a debt collector may not communicate with the consumer, without that consumer's prior consent, if the debt collector knows the consumer is represented by an attorney with respect to such debt "unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer." Additionally, as noted by Plaintiffs, a debt collector is prohibited from making a false representation of the character, amount, or legal status of any debt owned, 15 U.S.C. § 1692e(2)(A), from failing to communicate that a debt is disputed, 15 U.S.C. § 1692e(8), and from collecting any amount that is not expressly authorized by the agreement creating the debt or is permitted by law, 15 U.S.C.

§ 1692f(1).[7] A debt collector is also prohibited from further communicating, with certain limited exceptions, with the consumer if that consumer notifies the debt collector in writing that he or she is refusing to pay the debt or that the collector is to cease further communication. 15 U.S.C. § 1692c(c). A "communication" is deemed as "the conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. § 1692a(2). A consumer is "any natural person obligated or allegedly obligated to pay any debt." 15 U.S.C. § 1692a(3).

It is undisputed that Plaintiffs are consumers within the meaning of the FDCPA, Mr. Albright was their attorney with respect to their alleged debt to BJH, and Defendant is a debt collectors. It is also undisputed that the two complained-of letters are "communications" within the meaning of the FDCPA and are from Defendant to Mr. Albright.

Defendant argues that the two letters to Mr. Albright are not communications prohibited by the FDCPA. For the reasons set forth below, the Court agrees.

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[7] In their response to Defendant's motions for summary judgment and in their own motion for summary judgment, Plaintiffs argue that Defendant violated 15 U.S.C. §§ 1692c(b), 1692d(1), 1692e(5), 1692e(10), and 1692f(6) by threatening in a purported "lien letter" to take an action that could not legally have been taken, to improperly communicate information about their debt to other parties, and by threatening to place a lien on their insurance proceeds from the settlement. This latter threat is construed by Plaintiffs as a threat to use violence or other criminal means to harm their property, i.e., their settlement proceeds. In addition to consideration of these claims being precluded by Plaintiffs' failure to raise them in their complaint, the claims need not be reached for the reasons set forth below.

There is no Eighth Circuit Court of Appeals' opinion on point, nor is there an opinion on point by another Circuit Court of Appeals. In *Kropelnieki v. Siegel*, 290 F.3d 118, 128 (2nd Cir. 2002), the Second Circuit noted in dicta that "[w]here an attorney is interposed as an intermediary between a debt collector and a consumer, we assume the attorney, rather than the FDCPA, will protect the consumer from a debt collector's fraudulent or harassing behavior. However, this is not an issue on which we need to rule today." The court also noted that "we find serious flaws in [plaintiffs] argument that a violation of the FDCPA occurs where a party alleges that his attorney has been misled to the party's detriment." *Id.* at 127 (alteration added) (citing *Romea v. Heilberger & Assoc.*, 163 F.3d 111, 118 (2nd Cir. 1998) (holding that courts may depart from the plain language of the statute if accepting the literal language would lead to absurd results)). District court cases have, however, ruled on the issue of whether a communication from a debt collector to a consumer's attorney violates the FDCPA.[8]

The Eastern District of New York concluded in *Tromba v. M.R.S. Assocs.*, 323 F.Supp.2d 424 (E.D.N.Y. 2004), that a collection letter sent by facsimile transmission from "Bob McCoach, Senior Legal Associate" to the plaintiff consumer's attorney did not violate the FDCPA. *Id.* at 426, 428. Relying on the dicta in *Kropelnicki*, the court held that the plaintiff had "no cause of action under the FDCPA where a communication was solely directed to her attorney and no threat was made regarding contact with the debtor herself."

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[8] The Court notes that Plaintiffs discuss each of the cases cited by Defendant in great detail, including reviewing the cases referred to in the cited cases. Plaintiffs, however, cite no cases for their position that contact with an attorney for a consumer is, in effect, contact with the consumer under the FDCPA.

Id. at 428. Similarly, in *Zaborac v. Phillips & Cohen Assocs., Ltd.*, 330 F.Supp.2d 962 (N.D. Ill. 2004), the Northern District of Illinois concluded that the language of § 1692g(a) prohibiting a debt collector from contacting a consumer after being notified that the consumer is represented by an attorney "is strong evidence that it precludes only debt collection efforts targeting a consumer, not all communications between the debt collector and the consumer's lawyer (once the lawyer has entered the picture)." *Id.* at 966. The communication at issue was a "dunning letter" sent by a debt collector to a consumer. One count alleged that the debt collector had violated the FDCPA by discussing settlement with the plaintiffs attorney after the plaintiff consumer had disputed the debt but before the collector had provided the plaintiff with verification of the debt. The Court dismissed this count, holding that a reading of FDCPA that would not prohibit communications between a debt collector and a consumer's lawyer was "sound because a consumer's attorney is quite properly considered an intermediary between the debt collector and the consumer, and as such has his or her own responsibility for protecting the consumer."[9] *Id.* at 967 n.5. This reading was also consistent with the FDCPA's primary purpose: "to protect consumers from abusive, deceptive and

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[9] The Court agrees that the *Zaborac* opinion is an "eloquent decision," but Plaintiffs misstate its ruling. In *Zaborac*, liability under 15 U.S.C. § 1692g(a)(1) for misstating the amount of a debt was premised on the initial letter sent directly to the plaintiff consumer. 330 F.Supp.2d at 967-68. This claim was the second of the plaintiffs two-count complaint. The first count sought to hold the debt collector liable for communications with the plaintiffs attorney and was dismissed. *Id.* at 966-67. Plaintiffs are incorrect in their assertion that the § 1692g(a)(1) liability in *Zaborac* was premised on the letter from the debt collector to the plaintiff's attorney. Plaintiffs' reliance on the case is misplaced.

unfair debt collection practices at the hands of debt collectors." *Id.* at 966-67.[10]

A few weeks after the *Zaborac* decision, the District Court for the Central District of Illinois held in *Diesi v. Shapiro*, 330 F.Supp.2d 1002 (C.D. Ill. 2004), that a "Reinstatement Letter" sent by facsimile transmission from a debt collector to the plaintiff consumer's attorney did not violate the FDCPA. Although the plaintiff had argued that the letter was "false, misleading, and deceptive under [15 U.S.C.] §§ 1692e, 1692e(2), 1692e(10), 1692f, and § 1692f(1)," *id.* at 1003-04 (alteration in original), the Court rejected this argument, holding that "[c]ommunications between a debt collector and a consumer's attorney are not actionable under the FDCPA." *Id.* at 1004 (alteration added). *See also Phillips v. North American Capital Corp.*, 1999 WL 299872 at * 3 (N.D. Ill. 1999) (same holding).

In answer to these cases that uniformly conclude that communications between a debt collector and a consumer's attorney do not violate the FDCPA, Plaintiffs cite *Padilla v. PayCo. General American Credits, Inc.*, 161 F. Supp.2d 264 (S.D.N.Y. 2001). Their reliance on this case is misplaced. The plaintiff consumer was an attorney and the defendant was a debt collector attempting to collect a debt from the plaintiff arising out of student loans. The FDCPA protects consumers, regardless of whether they are lawyers. *See Johnson v. Equifax Risk Mg't Servs.*, 2004 WL 540459 at *4 n. 16 (S.D.N.Y. 2004) ("The fact that plaintiff is an attorney does

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[10] The Court did not dismiss the second count of the plaintiff's complaint alleging that the debt collector had violated the FDCPA by not stating the amount of the debt in the initial dunning letter sent *directly to the plaintiff consumer*. Id. at 967-68. *See also* note 9, supra.

not alter the application of the objective ['unsophisticated'] 'consumer' standard . . . [T]he basic purpose of the ['unsophisticated'] 'consumer' standard is to ensure that the FDCPA protects all consumers, the gullible as well as the shrewd[.]") (alterations added) (interim quotations omitted)).

The dicta in *Kropelnicki*, 290 F.3d at 128, and the holdings in the district court cases cited above that the FDCPA does not protect communications between a debt collector and a plaintiff consumer's attorney is reinforced by the requirement in § 1692g(b) that a debt collector cease from communicating with the consumer upon being informed that he or she is represented by an attorney. The FDCPA protects "unsophisticated consumers," *Strand*, 380 F.3d at 317, yet Plaintiffs' reading of the FDCPA equates the consumer's attorney with the consumer. It is a fundamental principal of statutory construction that statutes should be construed to give effect to all their clauses and words. *See Herman v. Associated Elec. Coop., Inc.*, 172 F.3d 1078, 1081 (8th Cir. 1999); *In re Windsor on the River Assocs.*, Ltd., 7 F.3d 127, 130 (8th Cir. 1993). Equating consumers with their attorneys would negate Congress' intent to protect the uninformed or naive consumer. *See Strand*, 380 F.3d at 317.

Because the Court finds that the two communications between Defendant and Plaintiffs' counsel do not violate the FDCPA, the Court declines to reach the issue of whether the BJH bill was misstated.

Accordingly,

IT IS HEREBY ORDERED that Defendant's second motion for summary judgment is **GRANTED**. [Doc. 23]

IT IS FURTHER ORDERED that Defendant's first

motion for summary judgment is **DENIED** as moot. [Doc. 16]

IT IS FURTHER ORDERED that Plaintiffs' motion for summary judgment is **DENIED**. [Doc. 30]

An appropriate Judgment shall accompany this Memorandum and Order.

/s/ Thomas C. Mummert, III

THOMAS C. MUMMERT, III
UNITED STATES MAGISTRATE JUDGE

Dated this 15th day of December, 2004.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

Case number 1:03cv0112 TCM

[Filed December 15, 2004]

NATHANIEL RICHMOND and	)
STEPHANIE RICHMOND,	)
Plaintiffs,	)
	)
v.	)
	)
NICHOLAS G. HIGGINS,	)
d/b/a Nicholas G. Higgins & Associates,	)
Defendant.	)
	)

JUDGMENT

In accordance with the Memorandum and Order filed this date and incorporated herein,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that this cause of action is **DISMISSED** with prejudice.

/s/ Thomas C. Mummert, III

THOMAS C. MUMMERT, III
UNITED STATES MAGISTRATE JUDGE

Dated this 15th day of December, 2004.

APPENDIX D

RELEVANT STATUTORY PROVISIONS

TITLE 15. COMMERCE AND TRADE
CHAPTER 41. CONSUMER CREDIT PROTECTION
DEBT COLLECTION PRACTICES

15 U.S.C. § 1692

§ 1692. Congressional findings and declaration of purpose

(a) Abusive practices. There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

(b) Inadequacy of laws. Existing laws and procedures for redressing these injuries are inadequate to protect consumers.

(c) Available non-abusive collection methods. Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.

(d) Interstate commerce. Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.

(e) Purposes. It is the purpose of this title [15 U.S.C. §§ 1692 et seq.] to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

15 U.S.C. § 1692a

§ 1692a. Definitions

As used in this title [15 U.S.C. §§ 1692 et seq.]--

(1) The term "Commission" means the Federal Trade Commission.

(2) The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.

(3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

(4) The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

(5) The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

(6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of

any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 808(6) [15 U.S.C. § 1692f(6)], such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include--

(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

(D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a

debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

(7) The term "location information" means a consumer's place of abode and his telephone number at such place, or his place of employment.

(8) The term "State" means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing.

15 U.S.C. § 1692b

§ 1692b. Acquisition of location information

Any debt collector communicating with any person other than the consumer for the purpose of acquiring location information about the consumer shall--

(1) identify himself, state that he is confirming or correcting location information concerning the consumer, and, only if expressly requested, identify his employer;

(2) not state that such consumer owes any debt;

(3) not communicate with any such person more than once unless requested to do so by such person or unless the debt collector reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information;

(4) not communicate by post card;

(5) not use any language or symbol on any envelope or in the contents of any communication effected by the mails or telegram that indicates that the debt collector is in the debt collection business or that the communication relates to the collection of a debt; and

(6) after the debt collector knows the consumer is represented by an attorney with regard to the subject debt and has knowledge of, or can readily ascertain, such attorney's name and address, not communicate with any person other than that attorney, unless the attorney fails to respond within a reasonable period of time to communication from the debt collector.

15 U.S.C. § 1692c

§ 1692c. Communication in connection with debt collection

(a) Communication with the consumer generally. Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt--

(1) at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer. In the absence of knowledge of circumstances to the contrary, a debt collector shall assume that the convenient time for communicating with a consumer is after 8 o'clock antimeridian and before 9 o'clock postmeridian, local time at the consumer's location;

(2) if the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer; or

(3) at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.

(b) Communication with third parties. Except as provided in section 804 [15 U.S.C. § 1692b], without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

(c) Ceasing communication. If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt, except--

(1) to advise the consumer that the debt collector's further efforts are being terminated;

(2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or

(3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy. If such notice from the consumer is made by mail, notification shall be complete upon receipt.

(d) "Consumer" defined. For the purpose of this section, the term "consumer" includes the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator.

15 U.S.C. § 1692d

§ 1692d. Harassment or abuse

A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person.

(2) The use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader.

(3) The publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting the requirements of section 603(f) or 604(3) of this Act [15 U.S.C. §§ 1681a(f) or 1681b(3)].

(4) The advertisement for sale of any debt to coerce payment of the debt.

(5) Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.

(6) Except as provided in section 804 [15 U.S.C. § 1692b], the placement of telephone calls without meaningful disclosure of the caller's identity.

15 U.S.C. § 1692e

§ 1692e. False or misleading representations

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general

application of the foregoing, the following conduct is a violation of this section:

(1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.

(2) The false representation of--

(A) the character, amount, or legal status of any debt; or

(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

(3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.

(4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

(6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to--

(A) lose any claim or defense to payment of the debt; or

(B) become subject to any practice prohibited by this title [15 U.S.C. §§ 1692 et seq.].

(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

(8) Communicating or threatening to communicate to any person credit information which is known or which should be

known to be false, including the failure to communicate that a disputed debt is disputed.

(9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.

(13) The false representation or implication that documents are legal process.

(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

(15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.

(16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 603(f) of this Act [15 U.S.C. § 1681a(f)].

15 U.S.C. § 1692f

§ 1692f. Unfair practices

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

(2) The acceptance by a debt collector from any person of a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit.

(3) The solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution.

(4) Depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument.

(5) Causing charges to be made to any person for communications by concealment of the true purpose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees.

(6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if--

(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;

(B) there is no present intention to take possession of the property; or

(C) the property is exempt by law from such dispossession or disablement.

(7) Communicating with a consumer regarding a debt by post card.

(8) Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business.

15 U.S.C. § 1692g

§ 1692g. Validation of debts

(a) Notice of debt; contents. Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing--

(1) the amount of the debt;

(2) the name of the creditor to whom the debt is owed;

(3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;

(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and

(5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide

the consumer with the name and address of the original creditor, if different from the current creditor.

(b) Disputed debts. If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector.

(c) Admission of liability. The failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer.

15 U.S.C. § 1692h

§ 1692h. Multiple debts

If any consumer owes multiple debts and makes any single payment to any debt collector with respect to such debts, such debt collector may not apply such payment to any debt which is disputed by the consumer and, where applicable, shall apply such payment in accordance with the consumer's directions.

15 U.S.C. § 1692i

§ 1692i. Legal actions by debt collectors

(a) Venue. Any debt collector who brings any legal action on a debt against any consumer shall--

(1) in the case of an action to enforce an interest in real property securing the consumer's obligation, bring such action only in a judicial district or similar legal entity in which such real property is located; or

(2) in the case of an action not described in paragraph (1), bring such action only in the judicial district or similar legal entity--

(A) in which such consumer signed the contract sued upon; or

(B) in which such consumer resides at the commencement of the action.

(b) Authorization of actions. Nothing in this title [15 U.S.C. §§ 1692 et seq.] shall be construed to authorize the bringing of legal actions by debt collectors.

15 U.S.C. § 1692j

§ 1692j. Furnishing certain deceptive forms

(a) It is unlawful to design, compile, and furnish any form knowing that such form would be used to create the false belief in a consumer that a person other than the creditor of such consumer is participating in the collection of or in an attempt to collect a debt such consumer allegedly owes such creditor, when in fact such person is not so participating.

(b) Any person who violates this section shall be liable to the same extent and in the same manner as a debt collector is

liable under section 813 [15 U.S.C. § 1692k] for failure to comply with a provision of this title [15 U.S.C. §§ 1692 et seq.].

15 U.S.C. § 1692k

§ 1692k. Civil liability

(a) Amount of damages. Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this title [15 U.S.C. §§ 1692 et seq.] with respect to any person is liable to such person in an amount equal to the sum of--

(1) any actual damage sustained by such person as a result of such failure;

(2) (A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000; or

(B) in the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

(b) Factors considered by court. In determining the amount of liability in any action under subsection (a), the court shall

consider, among other relevant factors--

(1) in any individual action under subsection (a)(2)(A), the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional; or

(2) in any class action under subsection (a)(2)(B), the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, the resources of the debt collector, the number of persons adversely affected, and the extent to which the debt collector's noncompliance was intentional.

(c) Intent. A debt collector may not be held liable in any action brought under this title [15 U.S.C. §§ 1692 et seq.] if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

(d) Jurisdiction. An action to enforce any liability created by this title [15 U.S.C. §§ 1692 et seq.] may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs.

(e) Advisory opinions of Commission. No provision of this section imposing any liability shall apply to any act done or omitted in good faith in conformity with any advisory opinion of the Commission, notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

15 U.S.C. § 1692l

§ 1692l. Administrative enforcement

(a) Federal Trade Commission. Compliance with this title [15 U.S.C. §§ 1692 et seq.] shall be enforced by the Commission, except to the extent that enforcement of the requirements imposed under this title [15 U.S.C. §§ 1692 et seq.] is specifically committed to another agency under subsection (b). For purpose of the exercise by the Commission of its functions and powers under the Federal Trade Commission Act [15 U.S.C. §§ 41 et seq.], a violation of this title [15 U.S.C. §§ 1692 et seq.] shall be deemed an unfair or deceptive act or practice in violation of that Act [15 U.S.C. §§ 41 et seq.]. All of the functions and powers of the Commission under the Federal Trade Commission Act [15 U.S.C. §§ 41 et seq.] are available to the Commission to enforce compliance by any person with this title [15 U.S.C. §§ 1692 et seq.], irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act [15 U.S.C. §§ 41 et seq.], including the power to enforce the provisions of this title [15 U.S.C. §§ 1692 et seq.] in the same manner as if the violation had been a violation of a Federal Trade Commission trade regulation rule.

(b) Applicable provisions of law. Compliance with any requirements imposed under this title [15 U.S.C. §§ 1692 et seq.] shall be enforced under--

(1) section 8 of the Federal Deposit Insurance Act [12 U.S.C. § 1818], in the case of--

(A) national banks, and Federal branches and Federal agencies of foreign banks, by the Office of the Comptroller of the Currency;

(B) member banks of the Federal Reserve System

(other than national banks), branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25(a) [25A] of the Federal Reserve Act [12 U.S.C. §§ 601 et seq. or §§ 611 et seq.], by the Board of Governors of the Federal Reserve System; and

(C) banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System) and insured State branches of foreign banks, by the Board of Directors of the Federal Deposit Insurance Corporation;

(2) section 8 of the Federal Deposit Insurance Act [12 U.S.C. § 1818], by the Director of the Office of Thrift Supervision, in the case of a savings association the deposits of which are insured by the Federal Deposit Insurance Corporation;

(3) the Federal Credit Union Act [12 U.S.C. §§ 1751 et seq.], by the Administrator of the National Credit Union Administration [National Credit Union Administration Board] with respect to any Federal credit union;

(4) the Acts to regulate commerce [49 U.S.C. §§ 10101 et seq.], by the Secretary of Transportation, with respect to all carriers subject to the jurisdiction of the Surface Transportation Board;

(5) the Federal Aviation Act of 1958 [49 U.S.C. §§ 40101 et seq.], by the Secretary of Transportation with respect to any air carrier or any foreign air carrier subject to that Act [49 U.S.C. §§ 40101 et seq.]; and

(6) the Packers and Stockyards Act, 1921 [7 U.S.C. §§ 181 et seq.] (except as provided in section 406 of that Act [7 U.S.C. §§ 226 and 227]), by the Secretary of Agriculture with respect to any activities subject to that Act [7 U.S.C. §§ 181 et seq.].

The terms used in paragraph (1) that are not defined in this title [15 U.S.C. §§ 1692 et seq.] or otherwise defined in section 3(s) of the Federal Deposit Insurance Act (12 U.S.C. 1813(s)) shall have the meaning given to them in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101).

(c) Agency powers. For the purpose of the exercise by any agency referred to in subsection (b) of its powers under any Act referred to in that subsection, a violation of any requirement imposed under this title [15 U.S.C. §§ 1692 et seq.] shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in subsection (b), each of the agencies referred to in that subsection may exercise, for the purpose of enforcing compliance with any requirement imposed under this title [15 U.S.C. §§ 1692 et seq.] any other authority conferred on it by law, except as provided in subsection (d).

(d) Rules and regulations. Neither the Commission nor any other agency referred to in subsection (b) may promulgate trade regulation rules or other regulations with respect to the collection of debts by debt collectors as defined in this title [15 U.S.C. §§ 1692 et seq.].

15 U.S.C. § 1692m

§ 1692m. Reports to Congress by the Commission; views of other Federal agencies

(a) Not later than one year after the effective date of this title and at one-year intervals thereafter, the Commission shall make reports to the Congress concerning the administration of its functions under this title [15 U.S.C. §§ 1692 et seq.], including such recommendations as the Commission deems

necessary or appropriate. In addition, each report of the Commission shall include its assessment of the extent to which compliance with this title [15 U.S.C. §§ 1692 et seq.] is being achieved and a summary of the enforcement actions taken by the Commission under section 814 of this title [15 U.S.C. § 1692l]

(b) In the exercise of its functions under this title [15 U.S.C. §§ 1692 et seq.], the Commission may obtain upon request the views of any other Federal agency which exercises enforcement functions under section 814 of this title [15 U.S.C. § 1692l].

15 U.S.C. § 1692n

§ 1692n. Relation to State laws

This title [15 U.S.C. §§ 1692 et seq.] does not annul, alter, or affect, or exempt any person subject to the provisions of this title [15 U.S.C. §§ 1692 et seq.] from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this title [15 U.S.C. §§ 1692 et seq.], and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with this title [15 U.S.C. §§ 1692 et seq.] if the protection such law affords any consumer is greater than the protection provided by this title [15 U.S.C. §§ 1692 et seq.].

15 U.S.C. 1692o

§ 1692o. Exemption for State regulation

The Commission shall by regulation exempt from the requirements of this title [15 U.S.C. §§ 1692 et seq.] any

class of debt collection practices within any State if the Commission determines that under the law of that State that class of debt collection practices is subject to requirements substantially similar to those imposed by this title [15 U.S.C. §§ 1692 et seq.], and that there is adequate provision for enforcement.

(2)

No. 06-65

FILED
AUG 15 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

NATHANIEL RICHMOND and
STEPHANIE RICHMOND,

Petitioners,

v.

NICHOLAS G. HIGGINS, d/b/a
NICHOLAS G. HIGGINS & ASSOCIATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-QUESTION PRESENTED

Does the Eighth Circuit's decision in this case conflict with *Heintz v. Jenkins*, 514 U.S. 291, 115 S. Ct. 1489 (1995), such that issuance of a Writ of Certiorari is warranted when the predicate facts of the two cases are distinctly different, as are the issues of law?

PARTIES TO THE PROCEEDINGS

Petitioners are Nathaniel Richmond and Stephanie Richmond. Respondent is Nicholas G. Higgins, d/b/a Nicholas G. Higgins & Associates.

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42 U.S.C. § 1396a(a)(25)(C) 9

42 U.S.C. § 1396a(a)(25)(C) & (D) 2

COUNTERSTATEMENT OF THE CASE

I. STATEMENT OF FACTS

Petitioner Nathaniel Richmond was injured in an automobile accident and treated at Barnes-Jewish Hospital ("BJH") in June 2001. *See Richmond v. Higgins*, 435 F.3d 825, 826 (8th Cir. 2006). The charges for the medical services rendered by BJH were never paid, either by Mr. Richmond, by an insurance company or by Medicaid. Mr. Richmond retained Attorney John Albright ("Albright") to represent him in his personal injury action against the other driver. *Id.* In October 2001, Albright requested a copy of Petitioner's unpaid bill and medical records from BJH. *Id.* at 827. On November 5, 2001, BJH provided the requested materials, which showed an outstanding balance of $6,716.40. *Id.* In January, February, and April of 2002, BJH contacted Albright regarding the outstanding balance on Petitioner's account. *Id.* Each time Albright informed BJH that Petitioner was attempting to settle the personal injury action and asked BJH to call back in a few weeks, but he did not challenge the validity or the amount of the debt. *Id.*

In October of 2002, BJH forwarded Petitioner's still unpaid account to Respondent Nicholas Higgins for collection. *Id.* On October 9, 2002, Respondent sent a notice of hospital lien letter to Albright referencing Petitioner, BJH, and the outstanding debt amount of $6,716.40. *Id.* As required by the FDCPA, 15 U.S.C. § 1692g(a)(4), the letter stated that failure to notify Respondent within thirty days of receipt of the letter of any dispute regarding the validity of the debt would result in an assumption that the debt was valid. *Id.* Albright never responded to the October 9, 2002 letter. On February 13, 2003, Respondent sent a second letter to Albright requesting a status report on

Richmond's personal injury claim. *Id.* Albright responded to the February 13 letter on April 1, 2003, alleging for the first time that Respondent had misstated the amount of the debt because federal Medicaid law prohibited BJH and Respondent from collecting an amount exceeding the amount Medicaid would pay. *Id.* On April 9, 2003, Albright sent Respondent another letter stating that he could not "find any way to enforce 42 U.S.C. § 1396a(a)(25)(C) & (D) against medical providers other than through the [FDCPA]." *Id.*

Petitioners' personal injury lawsuit settled on August 9, 2003. On September 30, 2003, Respondent wrote to Albright requesting that they discuss payment arrangements, otherwise BJH would reduce its claim to judgment. *Id.* On October 6, 2003, Petitioners sued Respondent in federal district court alleging that Respondent violated the FDCPA by misstating the debt amount. *Id.*

II. TRIAL COURT PROCEEDINGS

After Petitioners filed suit in the United States District Court for the Eastern District of Missouri, Respondent filed an initial Motion for Summary Judgment, arguing that Respondent was entitled to rely on the hospital's representations as to the amount of the debt, and that the focus of the FDCPA is on the conduct of the debt collector, not the amount of the debt. Respondent then filed a Second Motion for Summary Judgment, arguing that the FDCPA does not apply to letters to a consumer's attorney, as in this case. Petitioners then filed their own Motion for Summary Judgment, or in the alternative, Motion for Partial Summary Judgment as to Liability.

The District Court granted Respondent's Second Motion for Summary Judgment and denied Plaintiff's Motion For Summary Judgment, or in the alternative, Motion for Partial Summary Judgment as to Liability. Having granted Respondent's Second Motion for Summary Judgment, the District Court denied as moot Respondent's initial Motion for Summary Judgment and dismissed the action with prejudice. In an unpublished opinion, the District Court held that communications to a consumer's attorney are not actionable under the FDCPA, reasoning that to hold otherwise would essentially equate consumers with their attorneys and negate Congress' intent to protect the uninformed or naive consumer.

III. THE DECISION BELOW

On appeal to the Eighth Circuit Court of Appeals, Petitioners argued that the FDCPA applies to communications between a debt collector and a consumer's attorney. Respondent argued that the District Court's grant of summary judgment should be affirmed because the FDCPA does not apply to communications between a debt collector and a consumer's attorney. Respondent also argued that the record supported two additional independent bases for sustaining the grant of summary judgment. Respondent argued that he was entitled to rely on the hospital's representations as to the amount of the debt and that the debt was not in fact misstated or overstated.

The Eighth Circuit Court of Appeals affirmed the decision of the District Court, but not for the reasons stated in the District Court's opinion. *Richmond v. Higgins*, 435 F.3d 825, 829 (8th Cir. 2006). The Eighth Circuit began by noting that Petitioners' attorney Albright failed

to dispute the debt within the thirty-day time frame allotted by the FDCPA despite proper notice by Respondent that he had the right to do so. *Id.* at 827. The Eighth Circuit found that Petitioner Nathaniel Richmond never alleged that he was billed for services that were not provided or that he was overcharged for services received. *Id.* at 829. The Court further found that the conduct alleged to have violated the FDCPA was merely Respondent's attempt to collect a previously undisputed amount. *Id.* The Court's specific holding was stated as follows:

> [Petitioner] was aware of the debt amount for almost a year before the debt was sent to [Respondent] for collection. There is nothing in the record to show that the basis for the dispute did not exist prior to April 1, 2003. Having carefully reviewed the record and the text and legislative history of the FDCPA, we can ascertain no basis for a claim in these circumstances. To hold otherwise would be to sanction consumer conduct that the FDCPA clearly did not contemplate. We hold that there was no violation of the FDCPA, and therefore we affirm the district court's grant of summary judgment.

Id.

Petitioners then filed a Motion for Rehearing and Rehearing En Banc, which was denied by the Court of Appeals.

REASONS FOR DENYING THE WRIT

The Eighth Circuit ascertained that the debtor filed this FDCPA action just to dispute a debt. *Higgins*, 435 F.3d at 829. The debtor never alleged that he was billed for services that were not provided or that he was overcharged for the

services he received. *Id.* The Eighth Circuit recognized that the conduct challenged by the debtor was the debt collector's attempt to collect a previously undisputed debt amount. *Id.* The Eighth Circuit correctly held that, according to the text and legislative history of the FDCPA, there was no basis for a claim in these circumstances, and to hold otherwise would be to sanction consumer conduct that the FDCPA clearly did not contemplate. *Id.* The Eighth Circuit correctly ruled for Respondent. The Petition for Writ of Certiorari should be denied.

I. *HEINTZ V. JENKINS* DISTINGUISHED

Petitioners ostensibly seek a Writ of Certiorari from this Court on the basis that the Eighth Circuit's decision is in conflict with *Heintz v. Jenkins*, 514 U.S. 291, 115 S. Ct. 1489 (1995). Petitioners attempt to confuse the Court by claiming that the case at hand is "indistinguishable" from *Heintz* and that the Eighth Circuit's decision conflicts with the holding in *Heintz*.

Heintz involved a foreclosure on an automobile sales contract, wherein the bank (creditor) hired a lawyer to bring suit against the debtor for the deficiency after the sale. *See Jenkins v. Heintz*, 124 F.3d 824, 826 (7th Cir. 1997). The balance included unauthorized charges for force placed insurance. *Id.* at 827. A lawsuit was filed by Heintz, the debt collector, upon a deficiency balance. The allegedly offensive letter that prompted the FDCPA suit was mailed almost a month after the suit was filed. *Id.* As in this case, debtor failed to seek validation of the debt in the interim. *Id.* Moreover, and most importantly, the FDCPA suit against Heintz was in fact dismissed, despite Petitioners' claims, because the Seventh Circuit found, on

remand, that the debtor did not present evidence from which a jury could reasonably conclude that the debt collector knew of the unauthorized nature of the force placed insurance or that he intentionally falsely represented the character of the debt. *Id.* at 835.

This case involves a different fact pattern, and the decision of the Eighth Circuit based upon those facts presents no conflict with *Heintz*. Here, a consumer (Richmond) sought medical treatment from the creditor, a hospital, after suffering injuries from an automobile accident caused by a third party. At the time medical service was sought, the third party's insurance information was given by the consumer to the hospital. The hospital billed for the amount due for the services rendered. Four months later, the debtor's attorney requested the medical bills of debtor, for the purpose of using them to establish debtor's damages in the personal injury action against the third party who was liable for the automobile accident. The hospital sent the medical bills to debtor's attorney, who was then aware of the debt amount. The hospital contacted debtor's attorney on three separate occasions over the following five-month period. Debtor's attorney did not dispute the debt at anytime during any of those conversations. The debt was not turned over to Respondent, the debt collector, until six months later. The debt collector then sent a debt collection notice to debtor's attorney, who did not dispute the debt amount within thirty days of receipt of that letter. In fact, the debt collector did not receive notice that the debt was in dispute until almost six months after he sent the debt collection notice. As the Eighth Circuit observed, the debt collector was permitted under the FDCPA to assume that the debt was valid. *Higgins*, 435 F.3d at 829; *see also* 15 U.S.C.

§ 1692g(a)(3). In the year and five months between the date that debtor's attorney was first informed of the debt amount until he first disputed the debt amount, the amount never changed. What is obvious is the fact that the debtor's attorney refrained from disputing the debt until after the debtor's personal injury action against the liable third party was settled.

The legal issues in this case also differ from those in *Heintz*. The issue before this Honorable Court in *Heintz* was whether the term "debt collector" in the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§1692-1692*o* (1988 ed. and Supp. V), applied to a lawyer who "regularly," *through litigation*, tries to collect consumer debts. *Heintz,* 514 U.S. at 292, 115 S. Ct. at 1490. The legal issues upon remand centered upon whether an attorney could be held liable for violating the FDCPA by intentionally attempting to collect, on a bank's behalf, a debt that included unauthorized premiums for force placed insurance, given the absence of evidence that the attorney knew that the premiums were unauthorized, and then made a false representation as to the character of the debt. *Heintz*, 124 F.3d at 831-832.

The Eighth Circuit's decision in this case is correct and does not conflict with this Court's decision in *Heintz*. The Eighth Circuit's decision represents resolution of a factual issue rather than an important question of federal law. The Eighth Circuit correctly determined that pursuant to the facts of this case, Respondent could not be held liable for a violation of the FDCPA.

In their attempt to rebut the Eighth Circuit's holding, Petitioners also cite to *Arkansas Dept. of Health and Human Services v. Ahlborn*, ___ U.S. ___, 126 S.Ct. 1752

(2006), *Mallo v. Public Health Trust of Dade Co., Fla..*, 88 F. Supp.2d 1376 (S.D. Fla. 2000), and *Spectrum Health Continuing Care Group v. Anna Marie Bolling Irrevocable Trust Dated June 27, 2002*, 410 F.3d 304 (6th Cir. 2005). *Mallo* and *Spectrum*, however, are inapposite. Both of those cases dealt with the prohibition against "balance billing" after Medicaid had already paid the healthcare provider. "Balance billing" occurs when a hospital attempts to collect from a patient additional money for its services *after* it has been paid by Medicaid. Here, it is undisputed that no "balance billing" occurred.

Ahlborn is also inapplicable. The issue this Court considered in *Ahlborn* was the validity of an Arkansas statute which automatically imposed a lien in favor of the state's Department of Human Services on tort settlement proceeds to reimburse it for Medicaid payments made on behalf of the recipient. *Ahlborn*, 126 S.Ct. at 1755. Here, payments were never made by Medicaid to the creditor for services rendered to Mr. Richmond.

Petitioners cannot demonstrate the existence of any conflict with *Heintz* or a Circuit split of authority. Petitioners alleged below that Respondent violated the FDCPA in sending letters to Petitioners' attorney. Neither Petitioners, nor their attorney, disputed the amount of the debt within the thirty-day time frame contemplated. As the Eighth Circuit found, Respondent was therefore permitted to assume the debt was valid. *Ergo*, the letters, which Petitioners allege violated the FDCPA, were an attempt to collect a presumptively valid debt, per the language of the FDCPA. The FDCPA does not provide for an action in such situations.

II. THE IMAGINARY FELONY

Petitioners' attempt to show a violation of the FDCPA based on the operation of a Medicaid statute is illogical and unfounded. Petitioners allege that seeking payment in excess of Medicaid's rates from a patient covered by Medicaid is a felony. The issue of whether a felony was committed is irrelevant to this case, and even if it were relevant, as explained *infra*, any alleged felony cannot be imputed to Respondent.

Petitioners cite to 42 U.S.C. § 1320a-7b(d)(1), *Spectrum Health Continuing Care Group v. Anna Marie Bolling Irrevocable Trust Dated June 27, 2002*, 410 F.3d 304 (6th Cir. 2005) and 42 U.S.C. § 1396a(a)(25)(C) to support their contention. Petitioners misinterpret 42 U.S.C. § 1320a-7b(d)(1). Petitioners overlook the plain language of the statute, which requires that the services be provided "under the plan"; i.e., that the provider must accept Medicaid as payment in order for liability to attach for charging in excess of the state plan. The statute states that a provider cannot charge "*for any services provided to a patient under a State plan*" in excess of what the plan allows. Thus, the services must have been provided "under a State plan." However, the creditor in this case, the hospital, did not provide its services "under a State plan." Rather, it opted to bill the patient directly instead of seeking Medicaid payment. This statute contemplates the classic "balance billing" cases as identified above, which did not occur in this case. Therefore, Petitioners' interpretation of this statute and its application to the instant case is erroneous.

Spectrum is also distinguishable from the underlying case. *Spectrum* involved a hospital which attempted to

collect from a patient additional money for its services *after* it had been paid by Medicaid (also known as "balance-billing"). *Spectrum*, 410 F.3d at 308-309. Here, the hospital was never paid by Medicaid for services rendered to Mr. Richmond. Petitioners' reliance on *Spectrum* is without merit.

Petitioners' allegation of Respondent's commission of a felony is a desperate endeavor to confuse the very simple factual and legal issues involved in these proceedings and divert attention from Petitioners and their attorney's failure to timely dispute the debt as allowed for in the Act. Petitioners did not allege any violation of 42 U.S.C. § 1320a-7b(d)(1) in their Complaint, and only raised this issue for the first time in Petitioners' Reply to Respondent's Response in Opposition to Plaintiff's Motion for Summary Judgment in the District Court. Petitioner's allegations with respect to 42 U.S.C. § 1320a-7b(d)(1) amount to no more than a "smoke and mirrors" game intended to confuse the issues in pleadings to reviewing courts.

III. ANY ALLEGED FELONY CANNOT BE IMPUTED TO RESPONDENT

Assuming, *arguendo*, that the hospital (the creditor) did commit a felony by charging an amount that was not allowed by law under the Medicaid statute, the felonious act cannot be imputed to Respondent. As a matter of law, attorneys and debt collectors are entitled to rely on the information they receive from creditors and they are not held strictly liable when they mistakenly attempt to collect amounts in excess of what is due, if they reasonably relied on information provided by their clients. *Smith v. Transworld*

Systems, Inc., 953 F.2d 1025, 1032 (6th Cir. 1992); *Ducrest v. Alco Collections, Inc.*, 931 F. Supp. 459, 462 (M.D. La. 1996); *Jenkins v. Heintz*, 124 F.3d 824, 833-834 (7th Cir. 1997); *Jenkins v. Union Corp.*, 999 F. Supp. 1120, 1140-1141 (N.D. Ill. 1998); *Amond v. Brincefield, Hartnett & Associates, P.C.*, 175 F.3d 1013 (4th Cir. 1999).

Under the FDCPA, "[a] purported debtor's dispute of the existence or amount of a debt does not require a debt collector to independently investigate the alleged debt, because a debt collector is entitled to rely on the creditor's representation that the debt is valid." *Clark v. Capital Credit & Collection Services, Inc.*, 2004 WL 1305326 at *10 (D. Or. January 23, 2004) (*citing Bleich v. The Revenue Maximization Group, Inc.*, 233 F. Supp.2d 496, 500 (E.D.N.Y. 2002)); *see also Howe v. Reader's Digest Association, Inc.*, 686 F. Supp. 461, 467 (S.D.N.Y 1988) (a debt collector may reasonably rely on the accuracy of information provided by a creditor); *Smith*, 953 F.2d at 1032 (FDCPA does not require independent investigation of debt referred for collection); *Ducrest*, 931 F.Supp. at 462 (FDCPA does not require independent investigation of information provided by clients, or require debt collector to dispute creditor's construction of a contract.)

In the underlying case, Respondent was given a complete copy of Mr. Richmond's past due medical bill. Respondent was entitled to rely on this information, and furthermore had no duty to investigate whether Mr. Richmond was a Medicaid recipient at the time of the treatment.

The *Clark* decision, cited above, is instructive. In *Clark*, the plaintiffs argued that the defendants, including the creditor's attorney, violated the FDCPA by seeking to

collect a debt for medical treatment that was "either paid by insurance, subject to preconditions for collection, unpaid as a result of billing and insurance claims practices, not supported by billing to permit plaintiffs to make claims for insurance coverage and/or could not be verified to permit voluntary payment of a verified amount." *Id.* at *9. The court held that the attorney who acted as a debt collector for the creditors:

> was not required to examine the underlying documents concerning [plaintiff's] insurance coverage, the assignment of her debt . . . or other legal issues that might affect the legal status of the debt in question, or to calculate the charges and insurance reimbursements to determine if the amount of the verified debt was correct.

Id. at *10. The court also held that the defendant's status as an attorney did not obligate him to perform an independent legal analysis of the creditor's claim. *Id.* (*citing Jenkins v. Heintz*, 124 F.3d 824, 833-834 (7th Cir. 1997)). The court held that "[i]t was enough that he confirm that the creditor was seeking compensation for services performed, and that the creditor was seeking the amount he was attempting to collect." *Id.*

Petitioners attempt to downplay their failure to timely dispute the debt by making erroneous allegations that the debt collector in this case should be imputed with its clients' alleged knowing and willful violations of a Medicaid statute. However, in *Randolph v. IBMS*, 368 F.3d 726 (7th Cir. 2004), Judge Easterbrook eloquently wrote:

> Courts do not impute to debt collectors other information that may be in creditor's files – for example, that a debt has been paid or was bogus to start with. This is why debt collectors send out

> notices informing debtors of their entitlement to require verification and to contest claims. [citation omitted]. Verification would be unnecessary if debt collectors were charged with the creditor's knowledge.

Id. at 729 (emphasis added).

Petitioners, however, neither contested the debt nor asked for verification until a year and five months after notice of the debt was first sent. Petitioners' attorney admits in his Petition for a Writ of Certiorari that he had "no motivation" to review his client's medical bill and dispute the debt "until it seemed likely the tort claim [personal injury claim] would bear fruit." Petition, p. 9. The FDCPA sets forth a detailed procedure for disputing the validity of a debt. The consumer has the immediate opportunity to dispute the debt and, upon the making of a request for debt verification, all collection efforts must cease. *See* 15 U.S.C. § 1692g(a). This debt validation procedure must be clearly communicated to the consumer and courts are loathe to allow debt collectors to vary from, or contradict, the statutory notification. *Russell v. Equifax*, 74 F.3d 30, 34 (2d Cir. 1996).

Respondent's October 9, 2002 letter to Petitioners' attorney, Albright, contained a proper validation notice. However, Petitioners and their attorney, Albright, chose to ignore the debt validation procedure. As the Eighth Circuit correctly found, since Petitioners failed to timely dispute the debt pursuant to debt validation and dispute provisions of the Act, Respondent "was permitted under the FDCPA to assume the debt was valid." *See* § 1692g(a)(3).

CONCLUSION

Respondent agrees with Petitioners' statement that "[c]omplying with the [FDCPA] is simple." Petitioners, as the Eighth Circuit reasoned, had the right under the Act to dispute the debt within thirty days of receipt of the notice. *See* 15 U.S.C. § 1692g(a)(3). When the Petitioners failed to dispute the debt within that thirty-day period, Respondent had the right to assume that the debt was valid. *Id.* As the Eighth Circuit correctly found, Petitioners failed to timely dispute the debt, therefore Respondent was permitted under the Act to assume that the debt was valid. *Higgins*, 435 F.3d at 829. This case is a factual issue case rather than an important question of federal law. The Eighth Circuit correctly determined that pursuant to the facts of this case, Respondent could not be held liable for a violation of the FDCPA.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 06-65

Supreme Court, U.S.
FILED
AUG 24 2006
OFFICE OF THE CLERK

In the Supreme Court of the United States

NATHANIEL RICHMOND
and
STEPHANIE RICHMOND,
Petitioners,

v.

NICHOLAS G. HIGGINS, d/b/a
NICHOLAS G. HIGGINS & ASSOCIATES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF OF PETITIONERS

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PETITIONER'S REPLY

The debt collector tries to salvage the Eighth Circuit's erroneous conclusions of law by advancing the notions *Heintz* does not apply and the debt collector cannot be held to answer for the creditor's felonious billing practice, even if it occurred. *Heintz*, which involved communications between lawyers engaged in a dispute about the monies due under a contract, is not distinguishable. *Heintz v. Jenkins*, 514 U.S. 291 (1995). Before turning to *Heintz*, the consumers will establish the reality of the felony and briefly touch on why the debt collector's claim that it was just following the creditor's orders is not a viable defense.

I. GENUINE FELONIOUS BILLING PRACTICES

A theme running throughout the consumer's petition is the notion the debt collector engaged in or aided and abetted a felony. The debt collector suggests this notion is fanciful, as the statutory prohibition only applies to "...any service provided to a patient *under a State plan*...". 42 U.S.C. § 1320a-7b(d)(1)(emphasis in Respondent's Brief pg 9). The debt collector claims whether the service was provided under the plan depends on who the hospital chooses to bill. The hospital admitted for treatment a patient whose health insurance presumes the insurer, the State, will be billed. Mo. Code Regs. Ann. tit 13, § 70-4.030(1). The presumption can only be rebutted with a written agreement. *Ibid.* There is no written agreement and, in its absence, the hospital must bill Medicaid. *Ibid.* The patient has no personal responsibility for the bill. *Barney v. Holzer Clinc, Ltd.*, 110 F.3d 1207, 1209-11 (6th Cir. 1997). Regardless of who is billed, for the healthcare provider to charge anyone, the insured, the state or the tortfeasor, more than Medicaid would pay is a felony. 42 U.S.C. § 1320a-7b(d)(1).

The hospital could refuse to admit a person covered by Medicaid. *Barney*, 110 F.3d at 1209-11. However, having

admitted the consumer, the hospital does not enjoy the power to unilaterally change its contract with the State, which contract must past muster with the federal government and to which the consumer is third-party beneficiary. *Ibid.* The first entry on the consumer's bill is his Medicaid number, which is followed by an entry, made on the first business-day following admission, indicating the hospital certified his inpatient treatment with the State authorities. Deposition of Melinda Bowman, pp. 25-33, Exhibit 20 attached to court document 30, the Memorandum in Support of Plaintiff's Motion for Summary Judgment (by local rule, the undisputed facts are attached to the memorandum). As the hospital knew it was treating a Medicaid patient, its only defense was a claim, like that advanced by Arkansas and rejected by this court, that billing the tortfeasor was not covered by Medicaid. *Arkansas Dept. of Health and Human Services v. Ahlborn*, --- U.S. ---, 126 S.Ct. 1752 (2006). The position was untenable from the outset as 42 U.S.C. § 1396a(a)(25)(C) limits the obligation of the patient and any of the patient's financially responsible representatives and 42 U.S.C. § 1320a-7b(d)(1) outlaws charging, without limitation as to whom is billed, more than Medicaid would pay.

II. FOLLOWING ORDERS IS NO DEFENSE NO BONA FIDE ERROR, 1692k(c), DEFENSE

The debt collector claims in part III of its brief that Congress did not choose to impose liability when the collector is just following the creditor's orders. The problem with this notion is that the FDCPA imposes strict liability. It extends to conveying information regarding a debt directly or indirectly to any person through any medium. 15 U.S.C. § 1692a(2). The unacceptable collection practices listed in sections d, e and f extend to *any* conduct designed to harass *anyone*, § 1692d, *any* false representations in connection with *any* debt, § 1692e, and using unfair or unconscionable means

to collect *any* de..., § 1692f. Congress was capable of limiting liability to knowing or reasonably knowable errors when it saw fit. 15 U.S.C. § 1692e(8). If there were any doubt, the Act imposes liability on "...*any* debt collector who fails to comply with *any* provision of this subchapter with respect to *any* person..." except as otherwise stated in § 1692k. 15 U.S.C. § 1692k(a). This is why the Eighth Circuit, along with all the others, have held the FDCPA imposes strict liability. *See Picht v. John R. Hawks Ltd.*, 236 F.3d 446 (8th Cir. 2001). As observed by the Seventh Circuit, "debt collectors may not make false claims, period." *Randolph v. IMBS, Inc.*, 368 F.3d 726, 730 (Cir. 7th 2004)(holding that the bankruptcy code does not pre-empt the FDCPA).

Congress did not demand perfection from professional debt collectors. It set a floor defining groups of conduct wholly unacceptable and otherwise required them to behave in a professional manner. In lieu of creating a self-regulating vocation, Congress enlisted consumers as the oversight committee. It allowed professional debt collectors accused of an abusive practice to plead a *bona fide* error defense. Under the defense, the professional must plead and prove that it has adapted reasonable procedures for avoiding violations of the Act and only through some misadventure did the violation occur. 15 U.S.C. § 1692k(a) & (c). Congress undoubtedly imposed a minor statutory penalty on any debt collector who fell below the minimum professional standard absent a *bona fide* error, when Congress passed the following language:

> (a) Amount of damages. Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of--
>
> * * *

> (c) Intent. A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

15 U.S.C.A. § 1692k. There is no need to explore the subtleties of the *bona fide* error defense in this case, given the facts the debt collector claims are undisputed.

A comparison between *Heintz*, the case the debt collector finds so important, and the facts, the debt collector claims are material and undisputed, shows the debt collector's error. The law firm in *Heintz* had a multi-step vetting process before it filed suit. *Jenkins v. Heintz*, 124 F.3d 824, 834 (7th Cir. 1997). In the case at bar, the debt collector regularly collects debts for the hospital. Affidavit of Nicholas G. Higgins, ¶ 6, Exhibit C, attached to court document 27, Statement of Uncontroverted Facts for Defendant Nicholas G. Higgins d/b/a Nicholas G. Higgins & Associates Second Motion for Summary Judgment (Higgins Affidavit). Regardless of how elaborate a procedure a debt collector might construct, as Jenkins did, a professional debt collector should, at the very least, require the creditor's assurances it has no reason to believe collecting the debt will amount to a felony. In this case, the debt collector does not claim it has a procedure to double check the itemized bill it received from the creditor, as compared to *Jenkins*. Higgins Affidavit ¶¶ 7 & 8. The debt collector claims that, even at the late date of filing its second motion for summary judgment, it still did not know whether the consumer was covered by Medicaid. Higgins Affidavit ¶ 12. While such willful ignorance may prevent a criminal prosecution, it also forecloses any possibility the debt collector has a reasonable procedure to avoid misstating the

amount of the debt or any other of a half-dozen provisions of the FDCPA it could violate, when the patient is covered by Medicaid.

III. CONFLICT WITH *HEINTZ*?

The debt collector elects a shotgun approach to its claim the Eight Circuit did not refuse to follow *Heintz* in a case with indistinguishable facts. While the consumers would like to avoid the appearance of tit-for-tat acrimony, they have no choice but to respond to the arguments *seriatum*.

The debt collector claims *Heintz* is distinguishable because a lawyer was hired to collect a deficiency following a foreclosure and, as is born out by the ultimate resolution, the debt collector was exonerated. First, while *Heintz* involved conduct that might not have been covered by the FDCPA, this case involves conduct that is unquestionably within the Act. Second, while the Seventh Circuit refused to hold Heintz to a higher standard because he was a lawyer, the debt collector's notion in the case at bar is that he could meet a lower standard because he is a lawyer, which notion has no merit. *See Jenkins v. Heintz*, 124 F.3d 824 (7th Cir. 1997). The FDCPA regulates the conduct of debt collectors regardless of whether they hold a J.D. or a G.E.D. While two circuit judges ultimately agreed that Heintz committed a *bona fide* error in initially believing the creditor's representation the contract allowed forced placed insurance that included a payment bond,[1] in this case the consumers warned the debt collector it sought money not owed under the contract, cited the contract provision to the debt collector and, unlike the consumers in *Heintz*, they refrained from filing suit until the debt collector ignored the warning. In ignoring the

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[1] All purchase money consumer loans for houses and new cars include force placed "insurance". The problem in Heintz was the bank bought insurance that included coverage in case the consumer defaulted, a payment bond.

warning, the issue on remand will no longer include unintentional mistakes.

The debt collector next claims it was billing a third-party rather than the consumers and, although the consumer knew of the amount billed, it never disputed the charges. This court has already declared a tort settlement is a consumer's property and any notion that asserting a lien on a tort settlement is not an attempt to take the consumer's property is pure hokum. *Arkansas Dept. of Health and Human Services v. Ahlborn*, --- U.S. ---, 126 S.Ct. 172 (2006). The FDCPA does not impose obligations on consumers. Nonetheless, the consumers disputed the charges for the debt and they specifically advised the debt collector the terms of the contract creating the obligation prohibited collecting what the debt collector claimed was owed. They communicated the dispute to the creditor's lawyer, the only person they could.[2] While it is true this case is slightly different than *Heintz*, where the contract was ambiguous and the error was not repeated, in this case the lack of ambiguity in the contract, 42 U.S.C. § 1396a(a)(25)(C), and repeated violation makes the debt collector's conduct actionable, not excusable.

The debt collector claims it is obvious the consumers are disputing a debt. This mirrors the language in the Eighth Circuit's opinion. Neither the opinion nor the debt collector provides any explanation of why this might be important. It is true the measure of damages in an FDCPA suit does not include rescission of the contract or excusing the debt. However, the consumers never pled that as an element of damages. A second possible implication is that the subjective

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[2] When a debt collector is a lawyer, it imposes obligations on the consumers and additional burdens on the debt collector, such as warning unrepresented consumers they are dealing with a lawyer. This opens the question of whether the dissent in *Jenkins v. Heintz*, 124 F.3d 824 (7th Cir. 1997) had the better argument.

intent of the consumers in filing an FDCPA suit is in some way relevant. The notion has no statutory support. Every suit alleging a debt collector has misrepresented the amount of the debt will necessarily involve a consumer's dispute of the debt. Further, the notion has no factual basis in the case at bar. The money from the PI case was gone and the complaint alleged the violation the consumers warned the debt collector it was committing. The third possibility is the debt collector can blindly follow the creditor's orders after it has been warned the contract does not impose the obligation sought. Intransigence is an unfair practice.

The debt collector next claims *Heintz* is distinguishable because it addressed the issue of "whether the term 'debt collector' in the [ ] FDCPA applied to a lawyer who 'regularly,' *through litigation* tries to collect consumer debts." Respondent's Brief pg. 7. The debt collector then provides no explanation for how that legal principal does not encompass the application of the FDCPA "to a lawyer ... no [is acting as a debt collector]" sending dunning letters prior to suit being filed. *Heintz* is distinguishable only to the extent the case at bar lacks an issue of the FDCPA's applicability. This case falls squarely in the heartland of conduct covered by the Act. The debt collector's claim is simply a reiteration of the notion that, as a lawyer, the debt collector in question does not even have to meet the FDCPA standards, which issue was undoubtedly laid to rest in *Heintz*.

The debt collector then claims the Eighth Circuit only resolved a factual dispute. Such a notion is untenable, as summary judgment will only enter when the undisputed facts show the moving party should prevail. The case at bar is on all-fours with *Heintz* except that any fact with even the potential to create a legal issue as to the applicability of the FDCPA has been removed.

In the preceding sections of the Respondent's brief, it repeats a fundamentally flawed view of the Act. It defends Heintz's conduct on the theory Jenkins could not show the debt collector intentionally misrepresented the consumer's obligation under the contract nor that Heintz knew of the misrepresentation. The Act imposes no such burden on consumers. The Act bars any false representation as to the amount of the debt, period. 15 U.S.C. § 1692e(2)(A); *Randolph v. IMBS, Inc.*, 386 F.3d 726, 730 (7th Cir 2004). It is only when a debt collector admits the violation occurred and holds up its burden to prove a *bono fide* error that the debt collector's lack of intent may excuse the violation. 15 U.S.C. § 1692k(c). After a consumer warns a debt collector of a violation and it persists, the universe of issues shrinks to a point, did the violation occur.

The debt collector closes the first section of its brief by seeking to distinguish three cases the consumer's relied on. The problem is the consumers relied on four cases. The case the debt collector wishes to ignore establishes that, once a healthcare provider agrees to treat an individual covered by government health insurance, it has no choice but to bill the insurer. That case exposes the error in the debt collector's assertion the remaining three cases can be distinguished just because the healthcare provider billed the government insurance. The remaining three cases address the issue underlying the consumer's FDCPA suit, to-wit: when a third-party's negligence results in injury to a consumer covered by Medicaid, what interest in the settlement is subordinated, assignable or attachable.

The case the debt collector does not wish to discuss is *Barney v. Holzer Clinic, Ltd.*, 110 F.3d 1207 (6th Cir. 1997). In *Barney*, consumers advanced the proposition that a healthcare provider could not refuse to treat individuals covered by Medicaid. The would-be patients claimed that,

since there was a delay between providing the service and billing or receiving payment, the Equal Opportunity Credit Act (EOCA) precluded discriminating against those covered by government health insurance. The Sixth Circuit reasoned that, as the healthcare provider had no choice but to bill the government insurance scheme and the patient had no obligation to pay, there was no extension of credit thus the EOCA never came into play. *Barney, supra*. The creditor could have refused to admit the consumer. However, having admitted the consumer, the creditor does not enjoy the power to unilaterally change the terms of the contract under which the admission occurred.

Without waiver, the courts that have addressed the issue of the scope of a Medicaid patient's assignable or attachable interest in a tort settlement define it as the portion of the settlement attributable to medical expenses. It is true the three cases involve instances where Medicaid was billed, however, as with the case at bar, each involves a consumer covered by Medicaid who anticipates a tort settlement a healthcare provider is chasing. This case is simply the necessary extension to the last stop on the rail line. By making it a felony to charge anyone more than Medicaid would pay, Congress designated the stop.

The State of Florida decided it would be a good idea to attempt to collect from tort victim's the entire sum a healthcare provider billed the State, regardless of what the State actually reimbursed the healthcare provider. *Mallo v. Public Health Trust of Dade Co., Fla.*, 88 F.Supp.2d 1376 (S.D. Fla. 2000). The State action was in excess of Medicaid's statutory grant of authority and actionable under 42 U.S.C. § 1983. *Ibid.* The State of Arkansas tried to collect everything it had actually paid even though the fund it was attaching represented payments for elements of damages beyond the medical expenses. *Arkansas Dept. of Health and*

Human Services v. Ahlborn, --- U.S. ---, 126 S.Ct. 1752 (2006). This court held the fund was only liable to repay Arkansas to the extent the monies represented reimbursement to the consumer for the medical expenses. *Ibid.* A private healthcare provider extracted from a tort victim a confession, in open court, to a lien for the entire amount billed; it billed Medicaid; and, in an action not involving the State, sought to enforce the unpaid balance of the lien. *Spectrum Health Continuing Care Group v. Anna Marie Bowling Irrevocable Trust Dated June 27, 2002*, 410 F.3d 304 (6th Cir. 2005). The Sixth Circuit held that the sequence of events was extraneous and the healthcare provider could not expect a greater payment than that which Medicaid made. *Ibid.* The case at bar is the final extension of the progression, as the healthcare provider cannot choose who to bill after it elects to provide treatment, *Barney*, and, as the healthcare provider is bound by the terms of the insurance contract under which it provided treatment, it cannot weasel out. Congress declared it to be a felony to try and weasel out. 42 U.S.C. § 1320a-7b(d)(1).

It is an abusive collection practice to seek payment from one who does not have an obligation to repay the debt. It is an abusive collection practice to seek payment in excess of the consumer's obligation to a creditor. There is no special excuse applicable to lawyers. There is no conceivable reason why the FDCPA does not extend to a professional debt collector continuing to aid and abet a creditor's felonious billing practice after it has been warned the creditor is a scoundrel.

Respectfully Submitted,

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